RECENT AMERICAN DECISIONS.

Circuit Court, S. D. New York.

OLD DOMINION STEAMSHIP CO. *v.* McKENNA ET AL.

The procurement of workmen, who are employed upon terms as to wages which are just and satisfactory to quit work in a body for the purpose of inflicting injury and damage upon the employer by persons who are not in his employ, and until the employer should accede to demands of such outside persons, which he is under no obligation to grant, constitutes in law a malicious and illegal interference with the employer's business, which is actionable.

Declaring and attempting to enforce a boycott for the purpose of compelling an employer to pay such a rate of wages to his employees as the boycotters who are not in his employ might demand, are acts rendering the boycotters liable in damages, and are also misdemeanors at common law as well as by Pen. Code N. Y. § 168.

All combinations and associations designed to coerce workmen to become members of such combinations or associations, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skilful and to the unskilful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights—are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable.

An action to recover damages from those who have combined to do such an injury to a plaintiff's business, and the use of his property, is "an action for an injury to property," within the meaning of section 549, subd. 2, Code Civil Proc. N. Y., and an order for the arrest of defendants may be granted therein.

MOTION to Discharge from Arrest.

Clarence A. Seward, for plaintiffs.

Louis F. Post and *Samuel Ashton*, for defendants.

BROWN, J.—This action was brought to recover $20,000 damages alleged to have been sustained by the plaintiff through the unlawful action of the defendants, in the recent strike of the 'longshore-men, and in their attempt to boycott the plaintiff in its business as a common carrier. The defendants are alleged to constitute or to style themselves, an "Executive Board of the Ocean Association of the 'Longshore-men's Union." At the time of the commencement of the action they were arrested and held to bail under orders of arrest issued in conformity with the state practice. The defendants now move, upon the plaintiff's papers only, to vacate the order of arrest, on the ground that the material facts charged

are alleged on information and belief only, without a sufficient statement of the sources of information; that the facts stated do not make out a *prima facie* case; that it appears that the defendants were acting within their legal rights; and that the plaintiff's loss, if any, is *damnum absque injuria;* and that, at best, the plaintiff's case is so doubtful, that the order of arrest should not be sustained.

I have carefully considered the elaborate arguments of counsel, and examined the numerous authorities referred to. For lack of time, I can only state my conclusions:

1. All the material averments are either stated positively, or the source of information is sufficiently indicated.

2. The facts stated in the complaint and affidavit constitute a legal cause of action against all the defendants, for the actual damages suffered, for the following reasons:

(*a*) The plaintiff was engaged in the legal calling of a common carrier, owning vessels, lighters and other craft used in its business, in the employment of which numerous workmen were necessary, who, as the complaint avers, were employed "upon terms as to wages which were just and satisfactory."

(*b*) The defendants, not being in plaintiff's employ, and without any legal justification, so far as appears—a mere dispute about wages, the merits of which are not stated, not being any legal justification—procured plaintiff's workmen in this city and in southern ports to quit work in a body, for the purpose of inflicting injury and damage upon the plaintiff until it should accede to the defendant's demands, and pay southern negroes the same wages as New York longshore-men, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable.

(*c*) After the plaintiff's workmen, through the defendants' procurement, had quit work, the defendants, for the further unlawful purpose of compelling the plaintiff to pay such a rate of wages as they might demand, declared a boycott of the plaintiff's business, and attempted to prevent the plaintiff from carrying on any business as common carriers, or from using or employing its vessels, lighters, etc., in that business, and endeavored to stop all dealings of other persons with the plaintiff, by sending threatening notices

or messages to its various customers and patrons, and to the agents of various steamship lines, and to wharfingers and warehousemen usually dealing with the plaintiff, designed to intimidate them from having any dealings with it, through threats of loss and expense in case they dealt with the plaintiff by receiving, storing or transmitting its goods, or otherwise; and various persons were deterred from dealing with the plaintiff in consequence of such intimidations, and refused to perform existing contracts, and withheld their former customary business, greatly to the plaintiff's damage.

(*d*) The acts last mentioned were not only illegal, rendering the defendants liable in damages, but also misdemeanors at common law, as well as by section 168 of the Penal Code of this state.

(*e*) Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skilful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights,—are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable. See Greenh. Pub. Pol. 648, 653; *People* v. *Fisher*, 14 Wend. 1; *Tarleton* v. *McGawley*, Peake, *205; *Rafael* v. *Verelst*, 2 W. Bl. 1055; *Lumley* v. *Gye*, 2 El. & Bl. 216; *Bowen* v. *Hall*, 6 Q. B. Div. 333, 337; *Gregory* v. *Duke of Brunswick*, 6 Man. & G. 205; *Gunter* v. *Astor*, 4 J. B. Moore 12; *Reg.* v *Rowlands*, 17 Adol. & E. (N. S.) 671, 685; *Mogul St. Co.* v. *McGregor*, 15 Q. B. Div. 476; *Walker* v. *Cronin*, 107 Mass. 555; *Carew* v. *Rutherford*, 106 Id. 1; *State* v. *Donaldson*, 32 N. J. Law 151; *Master Stevedores' Ass'n.* v. *Walsh*, 2 Daly 1, 13; *Johnston Co.* v. *Meinhardt*, 60 How. Pr. 168; *Slaughter-house Cases*, 16 Wall. 36, 116.

3. There is no such doubt concerning the plaintiff's legal rights

as should debar it from the usual remedy. The motion to discharge from arrest is therefore denied.

Among the practical legal questions which the recent discussion of social problems has brought forward, none have assumed greater prominence than the discussion as to how far labor and trade combinations are in violation of the common law of conspiracy. Generally speaking, the American people have a peculiar genius for combinations. Many enterprises that in other countries are controlled by government, in our country, are carried out by voluntary combinations. DeTocqueville has pointed out the infinite diversity of these associations; and he ascribes to them an important influence in upholding our institutions. But combinations of this character are not altogether beneficial; and there seems to be a growing opinion of late that these combinations have in some instances, stepped beyond the bounds of legitimate action. When we behold the vicious methods often resorted to by associated corporations and individuals in controlling markets, or the tyranny of labor combinations, every one must admit that, at least in some of their phases, these combinations assume the character of unlawful conspiracies. It is a maxim of the law that there is no wrong without a remedy; and there is no exception in the case of wrongs inflicted by combinations of this character. Recent and direct adjudications, however, are few, and it will be necessary to consider many old English decisions and statutes and so to trace the development of this branch of the law in this country. And although it is possible to collect many general principles which run through the cases, yet there are many doubtful points still unsettled. It is almost impossible to lay down general rules which will always govern, and the only way in which the rules of law which apply to this subject can be understood, is by referring to the particular cases where they have been expounded and applied. And in order to bring out clearly the opinions of the various jurists who have discussed this subject, we will often find it necessary to cite the exact words which they use.

A conspiracy is a confederacy of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by some unlawful means. 2 Bish. Cr. Law (7th ed.) 175; *Com.* v. *Hunt*, 4 Met. 111; *Lambert* v. *People*, 9 Cow. 601; *Com.* v. *Judd*, 2 Mass. 329; Whart. Cr. Law (9th ed.) 1337; *People* v. *Fisher*, 14 Wend. 9. But in applying this definition to trade and labor, as well as other combinations, it becomes an important question as to what is the meaning to be given to the word "unlawful." Unlawful in this connection does not necessarily mean indictable as an offence. The additional power and dangerous character of a conspiracy often render a combination to do an act, criminal; when, if the act were done singly indictability would not attach.

Trade and labor combinations manifest themselves under different forms. There may be combinations merely to agree on certain terms in dealing with others. Again, combinations may be formed to carry out their demands by means of violence. And still other combinations may not contemplate violence, but may be formed for the purpose of prejudicing, coercing or defrauding individuals or the public. This is not intended as a scientific division of the subject. Other forms of trade and labor combinations might manifest themselves. And often combinations may have the characteristics of more than one of these kinds. But it will be convenient to discuss the subject under these headings; and this will enable us to bring out as clearly as possible, which combinations are considered legal, and which illegal.

Combinations where a Number of Labor-

ers or Business Men merely agree on certain terms which they will all ask in dealing with others.—An example of such a combination is where a number of workingmen meet and agree upon a price which they will ask for their labor and then say to their employer that they will not work for him except at the price fixed upon. It will be observed that such a combination is one of the mildest character. There is no intention to use violence, nor is it sought to dictate to the employer methods of conducting his business in regard to matters with which the workmen are not concerned. In England, there seems to be good reason to believe that even such a combination as this was an indictable conspiracy at common law. In early times this subject was regulated by statute. And all combinations to agree on terms to be asked for work were statutory conspiracies. But, independently of the statutes, there seems to have been an opinion that such combinations were indictable at common law.

The case of *Rex* v. *Journeymen Tailors of Cambridge*, 8 Mod. 10, decided in 1721, is usually cited in this connection. This case grew out of an indictment for conspiracy to raise wages, and it was held on motion in arrest of judgment, that the indictment need not conclude *contra formam statuti*, because it was for a conspiracy which was an offence at common law. It should be remarked, however, that this case is of little authority, the book it is published in, 8 Mod. Rep. being notoriously full of mistakes. For instance, Justice WILMOT, said of it that nine cases out of ten in that book are totally mistaken: *King* v. *Harris*, 7 Term Rep. 239.

In *Rex* v. *Mawbey*, 6 Term Rep. 619, there is a dictum of GROSS, J., who says: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy, although the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for conspiracy."

And in *King* v. *Eccles*, 1 Leach 274, Lord MANSFIELD places combinations to raise prices on the same footing as those to raise wages. As to combinations to raise prices of commodities at that time, see also, *Rex* v. *Norris*, 2 Ken. 300. He says: "Persons in possession of any articles of trade may sell them at such price as they individually may please, but if they confederate and agree not to sell under certain prices it is conspiracy. So every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence."

Although some of these decisions are of little authority yet there is good reason to believe that in England all combinations to raise the prices of wages or of commodities were criminal at common law. This seems to have been the general opinion in 1825 as far as labor combinations were concerned. And in that year parliament passed an act expressly authorizing labor combinations where workmen simply act in concert in demanding particular wages, hours of work, &c.

It would seem, however, that in some cases the courts, previous to the statute of 1825, held such combinations illegal because wages at that time were fixed by statute. And the very act of seeking to get higher than statutory wages was unlawful. Hence a combination to demand higher wages was a conspiracy to commit an offence, and hence, of course, illegal. This may serve to explain why a mere combination to agree on terms to be asked for work is not illegal in this country. In regard to this point SHAW, C. J., has said: "Although the common law in regard to

conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this state. The general rule of the common law is, that it is a criminal and indictable offence, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law, in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law, or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship—not being adapted to the circumstances of our colonial condition—were not adopted, used or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution already cited. This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this Commonwealth, and show why a conviction in England, in many cases would not be a precedent for a like conviction here. *The King* v. *Journeymen Tailors of Cambridge*, 8 Mod. 10, for instance, is commonly cited as an authority for an indictment at common law, and a conviction of journeymen mechanics of a conspiracy to raise their wages. It was there held, that the indictment need not conclude *contra formam statuti*, because the gist of the offence was the conspiracy, which was an offence at common law. At the same time it was conceded, that the unlawful object to be accomplished was the raising of wages above the rate fixed by a general act of parliament. It was therefore a conspiracy to violate a general statute law, made for the regulation of a large branch of trade, affecting the comfort and interest of the public; and thus the object to be accomplished by the conspiracy was unlawful if not criminal." *Com.* v. *Hunt*, 4 Met. 121. See, also, *Com.* v. *Carlisle*, Bright. 37. Hence, in this country it seems to be well settled law that a combination of laborers merely to agree on what terms they are to work is not criminal. 2 Bish. Cr. Law 233; *Master Stevedores' Ass'n* v. *Walsh*, 2 Daly 5; *State* v. *Donaldson*, 3 Vroom 151; *Johnson* v. *Meinhart*, 60 How. Pr. Rep. 171. But see, *People* v. *Fisher*, 14 Wend. 9. Something more must be alleged and proved than a mere combination. Any other doctrine would be entirely inconsistent with the spirit of our institutions. The great employer who is perhaps a business firm or corporation in in which is concentrated the capital of many persons would have a great advantage over its employees if each of them were required to treat with it separately. It is said that in union there is strength. If capital has a right to combine, labor also has a right to combine; and both labor and capital are held to the same rules in determining the lawfulness of the combination.

Combinations where the Purposes of the Organization are sought to be accomplished by Violence.—About this form of conspiracy there need be little said. To assault a man is criminal; and to conspire to conduct a strike or boycott by a systematic resort to assault and battery, is a conspiracy to accomplish a purpose by unlawful means, thus bringing it within the definition given above: *Master Stevedores' Association* v. *Walsh*, 2 Daly 10; *Johnson* v. *Meinhart*, 60 How. Pr. Rep. 168;

Commonwealth v. *Hunt*, 4 Met. 111. It is very necessary, however, that this form of trade and labor conspiracies be carefully distinguished from the other forms. And the language of the decisions should be carefully scrutinized in order to ascertain whether the unlawfulness of the combination is placed upon this ground or upon other grounds.

Combinations where Violence is not contemplated, but which are formed for the purpose of Prjeudicing, Coercing or Defrauding Individuals or the Public.—An example of such a conspiracy is where a number of workmen say to an employer, "Discharge A. B. or we will leave you—buy in this market or that market; conform to this rule or that rule, or we will not continue in your employ." This brings up a very delicate question: It may be said, "Has not a man a right to work for whom he pleases? Has he not a right to refuse to work for any reason which may suit his fancy?" To this the law must answer: "Yes." Generally speaking, every man has a right to work for whom he pleases and to manage his own affairs. But where a combination of men, not content with managing their own business, seek to manage the affairs of others; where, by concerted means and with an evil intent, they seek to deprive another of *his* right to manage *his* business, then the law steps in and protects the man whose rights are infringed. The weight of authority seems to be that while, generally speaking, the right to form business relations at will is not to be questioned, yet that right must not be exercised to prejudice or coerce others. This point has been often questioned, and it will be necessary to review the principal English and American authorities in order to gather a general rule upon this subject and to distinguish as far as possible the seemingly inconsistent cases.

In England the subject of wages has, from an early date, been regulated by statute. But the statute of 6 Geo. IV., c. 129, enacted in 1825, repealed all these early statutes and enacted that combinations of laborers merely to agree on what terms they should work would not be unlawful. And it has been held in England, that while the statute allowed combination of workingmen to agree on what terms they should work, yet a combination formed for the purpose of coercing an employer in regard to managing his business was not touched by the statute and hence was indictable. For instance, in *King* v. *Bykerdike*, 1 M. & Rob. 179, the question came up as to whether it was lawful for workmen to conspire to coerce the employer to discharge certain men, by threatening to leave in a body. And PATTESON, J., told the jury that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ; and that this compulsion was clearly illegal. Questions of a similar nature to this have come up for adjudication a number of times in England since the Statute of 6 Geo. IV. In many cases it has been held that such acts were conspiracies to violate another provision of the statute which prohibited interfering with another in regard to his business or labor by threats, molestation, intimidation, and obstruction. Yet it has been often said that this form of conspiracy would be criminal at common law, independently of this latter provision of the statute: *Walsby* v. *Anley*, 3 E. & E. 516; *Reg.* v. *Hewitt*, 5 Cox C. C. 162; *Reg.* v. *Duffield*, Id. 404; *Reg.* v. *Druitt*, 10 Id. 493; *Reg.* v. *Rowlands*, 5 Id. 436; *Hilton* v. *Eckersley*, 6 E. & B. 47; *Shelburn* v. *Oliver*, 13 L. T. (N. S.), 630; *Skinner* v. *Kitch*, L. R., 2 Q. B. 392; *Reg.* v. *Bunn*, 12 Cox C. C. 316; *In re Perham*, 5 Hurl. & N. 30.

We thus see that in England the distinction is made between a mere combination to unite on terms which all will ask for their work and a conspiracy in which there is an intent to coerce or im-

poverish another; and that a statutory provision allowing the former species of combination does not include the latter species.

In this country the same distinction seems to be made. And while, as we have shown before, a mere combination to unite on terms which all will ask for their work is not considered unlawful in this country, yet a combination to coerce or impoverish another is criminal.

In *People* v. *Melvin*, 2 Wheeler Cr. Cas. 262, and *People* v. *Trequier*, 1 Id. 142, two early New York cases, it was held that it was criminal for the workmen to combine; and, by leaving work in a body, coerce the employer into discharging certain men. Since 1829 this subject has been regulated in New York by statute, yet it has been said in that state that such conspiracies were indictable, independently of the statute: *People* v. *Fisher*, 14 Wend. 9; *Master Stevedores' Association* v. *Walsh*, 2 Daly 1.

State v. *Donaldson*, 3 Vroom 151, was a well-considered New Jersey case. There was a statute in New Jersey making penal certain combinations injurious to trade. But, as the statute was held not to abrogate the common law, the case was considered on common-law principles. The facts alleged in the indictment were that several employees had formed a conspiracy "to control, injure, terrify and impoverish" their employers, and that they notified their employers that unless certain workmen were discharged, that the conspirators would leave work in a body; and on this being refused, they ceased work as they had threatened. It was held that such a combination was criminal, and BEASLEY, J., said: "It appears to me that it is not to be denied, that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. * * * In the natural position of things, each man acting as an individual, there would be no coercion; if a single employee should demand the discharge of a co-employee, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees, it would be but a waste of time to pause to prove that, in most cases, he must submit under pain of often the most ruinous losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another. * * * In my opinion, this indictment sufficiently shows that the force of the confederates was brought to bear upon their employer for the purpose of oppression and mischief, and that this amounts to a conspiracy." See also *Carew* v. *Rutherford*, 106 Mass. 1; *Snow* v. *Wheeler*, 113 Id. 179; *Walker* v. *Cronin*, 107 Id. 555. But see *Payne* v. *Rd. Co.*, 13 B. J. Lea 507; *Bowen* v. *Matheson*, 14 Allen 499.

But a conspiracy to control the will of another by quitting work for him simultaneously is not the only way in which this object may be accomplished. In the buying and selling of commodities a combination of persons may arrange their terms of doing business or refuse to deal with another, with an intent to ruin him.

This, it will be seen, is one form of a boycott. But the boycott is the same as a strike or lockout in principle. Whether the combination to coerce or prejudice another be by refusing to deal with him or to work for him, the same rules apply. But while the principle of the law is the same, yet in practice the boycott presents the evil aspects of a strike in a more aggravated form. It seems to be peculiarly ill adapted to American institutions. A strike more frequently has something to do with the real issue in dispute. Often it may be regarded as a mere incident in striking a bargain. The workmen offer to work on certain terms. But the employer says he will not accept the offer, so the workmen say that they will wait till he does accept. Strikes generally have other elements than this; but they may be, and often are, nothing more. The boycott, however, is usually introduced as a side issue. The boycotter seldom or never has any fault to find with a salesman's goods. The direct transaction between the parties is entirely lost sight of. The boycott is applied in order to coerce him in regard to some entirely different matter. It is a peculiar species of industrial warfare, which, as generally conducted, is highly criminal, and which public opinion universally condemns. Often the boycotters have a man so in their power that they freely extort money from him, thus making the offence more atrocious. In the celebrated Theiss boycott in New York city, offensive circulars were distributed in front of the victim's place of business. Pressure was so brought to bear that the supplies necessary to carry on his business were refused. And ruin was only averted by the payment of a large sum of money. Surely, when a boycott is carried to such an extent, it must be a flagrant violation of the law.

The English case of *Mogul S. S. Co.* v. *McGregor*, 5 Q. B. Div. 476, a civil action in the Queen's Bench Division, decided in 1885, involved a peculiar species of boycotting. This was an action the parties to which were the respective owners of ships plying between England and China. The defendants in that case had conspired to ruin the plaintiff's business by allowing certain discounts to those who would deal with them exclusively. The plaintiffs had applied for an interlocutory injunction pending the trial restraining the said acts of defendants. It was held that this was not a proper case for an injunction, on the ground that the injury was not irreparable and for other reasons. COLERIDGE, C. J., however, who delivered the opinion of the court, said: "It is certainly conceivable that such a conspiracy —because conspiracy undoubtedly it is— as this might be proved in point of fact: and I do not entertain any doubt, nor does my learned brother, that, if such a conspiracy were proved in point of fact, and the intuitus of the conspirators were made out to be, not the mere honest support and maintenance of the defendant's trade, but the destruction of the plaintiff's trade, and their consequent ruin as merchants, it would be an offence for which an indictment for conspiracy, and, if an indictment, then an action for conspiracy would lie."

The recent cases in this country which have been decided as to the legality of the form of strikes and boycotts now under consideration have been very decided in pronouncing them illegal.

Besides the principal case, we have the case of *State* v. *Glidden*, 3 New Eng. Rep. 849, which was decided April 1, 1887, by the Supreme Court of Connecticut—a case in which the defendants had sought to procure the discharge of certain workmen by leaving work in a body, and where they had sought to further enforce demands by a boycott— CARPENTER, J., in delivering the opinion of the Court, held these acts criminal by local statute. But he also discussed the common law of conspiracy, and found the acts of defendants equally unlawful

at common law. He said: "It seems strange in a country in which law interferes so little with the liberty of the individual, that it should be necessary to announce from the bench that every man may carry on his business as he pleases, may do what he will with his own, so long as he does nothing unlawful and acts with due regard to the rights of others, and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of citizens, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control, by means little if any better than force, the action of employers. The defendants and their associates said to the Carrington Publishing Company: 'You shall discharge the men you have in your employ, and shall hereafter employ only such men as we shall name. It is true we have no interest in your business; we have no capital to invest therein; we are in no wise responsible for its success, and we do not participate in its profits, yet we have a right to control its management and compel you to submit to our direction.' The bare assertion of such a right is startling. * * * Suppose the government should assert the right in the same manner to regulate and control the business affairs of the Carrington Publishing Company, and other business enterprises, how long would the people submit to it? And yet the exercise of such a power by government would be far more tolerable than its exercise would be by secret organizations, however wise and intelligent such organizations may be,—for government is established by the people and is responsible to all the people. * * * They (the laborers) had a right to ask the Carrington Publishing Company to discharge its workmen and employ themselves, and to use all proper arguments in support of their request. But they had not the right to say, 'you shall do this or we will ruin your business.' Much less had they a right to ruin its business. In such a case the direct and primary object must be regarded as the destruction of the business. The fact that it is designed as a means to an end, and that end in itself considered a lawful one, does not divest the transaction of its criminality."

Thus the courts of this country seem to be settling down to the conclusion,[1] that a conspiracy to coerce or prejudice one in his business, even though there be no violence, is unlawful. The courts, however, are very careful in applying this rule. The purpose of the combination must be shown to be wrongful. It is, perhaps, by considering the strict application of this rule that the case of *Commonwealth* v. *Hunt*, 4 Met. 111, in Massachusetts can be distinguished from the cases already cited. In that case a number of journeymen boot-makers formed a club, one of the regulations of which was that no member should work for a manufacturer who employed any one not a member of that club. It was held that this was not *per se* unlawful. Said SHAW, C. J.: "Stripped, then, of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this, that the defendants and others formed themselves into a society, and agreed not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman. The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or

to raise their intellectual, moral and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those who become members of an association with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association was criminal." In speaking of this case, BEASLEY, J., in *State* v. *Donaldson*, cited *supra*, held that the case was clearly distinguishable. He said: "I concur entirely as well with the principles embodied in the opinion which was read in the case as in the result which was attained. The foundation of the indictment in that case was the formation of a club by journeymen boot-makers, one of the regulations of which was, that no person belonging to it should work for any master workman who should employ any journeyman or other workman who shonld not be a member of such club. Such a combination does not appear to possess any feature of illegality, for the law will not intend, without proof, that it was formed for the accomplishment of any illegal end. * * * The force of this association was not concentrated with a view to be exerted to oppress any individual, and it was consequently entirely unlike the case of men who take advantage of their position to use the power, by a concert of action, which such position gives them, to compel their employer to a certain line of conduct. The object of the club was to establish a general rule for the regulation of its members; but the object of the combination, in the case now before this court, was to occasion a particular result which was mischievous, and by means which were oppressive. The two cases are not parallel, and must be governed by entirely different considerations."

Again, as illustrating the strictness with which the courts regard the rule making combinations criminal where force is not threatened, it was said in Pennsylvania, that when the laborers form a conspiracy to prejudice their employers, that it was lawful for the employers to combine to resist the conspiracy. It was held that the motive determined the illegality of the act. "A combination to resist oppression, not merely supposed but real, would be perfectly innocent —for, where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy. It is a fair employment of means not criminal in the abstract, but only so when directed to the attainment of a criminal object; and it is therefore idle to say the law affords a remedy to which the parties must recur: the legal remedy is cumulative, and does not take away the preventive remedy by the acts of the parties. It would be an assumption of the question to say it is criminal to do a lawful act by unlawful means, when the object must determine the character of the means:" GIBSON, J., in *Commonwealth* v. *Carlisle*, Bright 42.

There has been much talk of late in reference to conspiracies which have for their object the controlling of prices of the various staples in the markets. The combinations which are everywhere making their appearance to control the prices of the necessities of life are no doubt extremely prejudicial to the public. We have before shown that by the old English common law and statutes all combinations to raise prices were criminal. So, also offences of this general nature even when committed by one person, as engrossing, forestalling and regrating were criminal both by statute and by common law. 4 Bl. Com. 158. But these offences have been modified by statute in England and also in many of the American states. But where the common law of this subject has not been specifically abolished by statute "modern ideas of trade have practically abrogated

some common-law doctrines which are supposed to unduly hamper commerce." CAMPBELL, J., in *Raymond* v. *Leavitt*, 46 Mich. 447. Yet where there is a combination it would seem that there is more reason to regard the proceeding as criminal. In Pennsylvania an action was brought to recover on a contract to suspend the deliveries and sales of coal. This contract was declared void as being in restraint of trade; and AGNEW, J., held that it was criminal to enter into such a combination, although his remarks must be considered *obiter* in this case. He said: "Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. * * * But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire production. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offence. * * * Every 'corner,' in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the market, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty and woe." *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 186. See also, *Hooker* v. *Vandewater*, 4 Denio 349; *Raymond* v. *Leavitt*, 46 Mich. 447; *People* v. *Fisher*, 14 Wend. 9. It would seem, however, that a mere combination of individuals to agree to ask a certain price for a commodity is not *per se* criminal. Such a doctrine would not be in harmony with the law in regard to labor combinations and would not suit the general spirit of our commercial institutions. But where a combination is formed, the manifest effect of which is to greatly prejudice the public; where the entire product of a great staple, as, for instance, coal, is centered in the control of a single combination, it could hardly be urged that there is not enough of the old common law in force to punish such a combination. This question is likely to become very important in the future, as there is great dissatisfaction with the doings of such combinations, and there is an inclination to make them answer for their conduct in the courts if possible.

Where the element of fraud enters in, however, the combination is generally criminal. A conspiracy to defraud is in many cases held criminal, when, if the fraud were committed by one, no criminal proceeding could be instituted: Bish. Cr. Law (7th ed.) 198, and cases there cited. And to defraud the public is regarded as even more culpable than to defraud an individual. In *Rex* v. *De Berenger*, 3 M. & S. 67 (see also *Reg.* v. *Gurney*, 11 Cox C. C. 414; *Rex* v. *Roberts*, 1 Camp. 399; *Commonwealth* v. *Supt. Philadelphia County Prison*, 6 Phila. 169; *Samp-*

son v. *Shaw*, 101 Mass. 145; *Rex* v. *Stenson*, 12 Cox C. C. 111), a leading case upon this subject, it was held that a combination to raise the price of the public funds by circulating false rumors was criminal. The corners which are conducted on 'change are often in fraud of the public, and are a very heinous form of criminal conspiracies. Again, the conspiracies which are often resorted to, to depress the value of stocks possess the most revolting degree of culpability. For instance, a number of persons who have been elected directors of a railroad company enter deliberately into a conspiracy to betray the trust reposed in them. The road is to be saddled with debts, its credit ruined and the innocent purchaser of the stock forced to part with it at a great loss. Such combinations are unquestionably criminal conspiracies.

Concluding Considerations.—It is often said that the law is made for the rich man, and that it has little regard for the poor man. This has been said especially of late in regard to the law of conspiracy. It may be that the law is more often enforced against the poor man. But as regards the law itself, an examination of the authorities negatives this idea. It is only when the workingman seeks to interfere with the rights of others that the strong arm of the law is called upon to intervene. And, strange as it may seem, the cases in which the combinations of workmen become unlawful are very often where they seek to procure the discharge of fellow-workmen. Yet such an attack is as much an attack upon labor as it is upon capital. Every workman should have a right to adopt such means us he may deem best to better his condition. Often the measures adopted by labor unions are of more injury to the laborer than they are to the employer. No labor union has a right to coerce a laborer to join it by threats of depriving him of his means of making a livelihood and reducing him to beggary. It is a form of despotism which can never be tolerated. Nor would the honest business man be at all prejudiced by the enforcement of the law which prohibits corrupt conspiracies for controlling markets. A free market, where any man may buy or sell in good faith, is of great importance to the business community; and the Stock Exchange and the Board of Trade, so far as they supply a free market, are among the most valuable of our business institutions. But, notwithstanding the enormous benefits of these institutions, we find that among the people they are looked upon with distrust. It is because, among other reasons, of the criminal conspiracies which are known to be entered into within their walls. It would be better for the public —better also for reputable brokers in Wall street—if the law in regard to this form of conspiracies were more often enforced. As a whole, the law of conspiracy presents a just and equitable department of our jurisprudence. Each citizen is alike protected in his rights. Each is made subject to the legal restraint when he fails to show due regard for the rights of others. Still it should be remembered that the decisions upon which the law is grounded are some of them old English cases which are meagerly reported, that much of the authority ordinarily cited consists of dicta and *nisi prius* decisions, and that there are many decisions of courts of last resort which it is difficult to harmonize with the weight of authority. Then, the law upon this subject appears to many to be contrary to some of the general maxims which have been accepted as a guide in our policy. The people of this country are very jealous when their freedom of combination is even seemingly interfered with, and they may not always see the justice of decisions which are founded upon authority which is the least doubtful. Our legislature, then, should enact delaratory statutes, declaring as accurately as may be just, what combinations are legal and what illegal. And this

formal legislative declaration, broadly interpreted by our courts, with due regard to our peculiar institutions, would set at rest much controversy as to the legal right of capital and labor.

HARRISON H. BRACE.

Supreme Court of the United States.

EX PARTE BAIN, JR.

The declaration of Article V. of the Amendments to the Constitution, that "no person shall be held to answer for a capital, or otherwise, infamous, crime, unless on a presentment or indictment of a grand jury," is jurisdictional, and no court of the United States has authority to try a prisoner without indictment or presentment in such cases.

The indictment here referred to is the presentation to the proper court, under oath, by the grand jury, duly impanelled, of a charge describing an offence against the law for which the party charged may be punished.

When this indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the constitution above recited, which would be of little avail if an indictment once found can be changed by the prosecuting officer, with the consent of the court, to conform to their views of the necessities of the case.

Upon an indictment so changed the court can proceed no further. There is nothing in the language of the constitution, which the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to try.

According to principles long settled in this court the prisoner, who stands sentenced to the penitentiary for such trial, is entitled to his discharge by writ of *habeas corpus*.

ON Petition for a writ of *habeas corpus*.

The opinion of the court was delivered by

MILLER, J.—This is an application to this court for a writ of *habeas corpus* to relieve the petitioner, George M. Bain, Jr., from the custody of Thomas W. Scott, United States Marshal for the Eastern District of Virginia. The original petition set out with particularity proceedings in the Circuit Court of the United States for that district, in which the petitioner was convicted under Section 5209 of the Revised Statutes, of having made a false report or statement as cashier of the Exchange National Bank of Nor-

folk, Virginia. The petition has annexed to it as an exhibit all the proceedings, so far as they are necessary in the case, from the order for the impanelling of a grand jury to the final judgment of the court sentencing the prisoner to imprisonment for five years in the Albany penitentiary. Upon this application the court directed a rule to be served upon the marshal to show cause why the writ should not issue, to which that officer made the following return: "Comes the said Scott, as marshal aforesaid, and states that there is no sufficient showing made by the said Bain that he is illegally held and confined in custody of respondent; but, on the contrary, his confinement is under the judgment and sentence of a court having competent jurisdiction to indict and try him, and he should not be released; and respondent prays the judgment of this court, that the rule entered herein against him be discharged, and the prayer of the petition be denied." The Attorney-General of the United States, and the District Attorney for the Eastern District of Virginia, appeared in opposition to the motion, and thus the merits of the case were fully presented upon the application for the issue of the writ.

Upon principles which may be considered to be well settled in this court, it can have no right to issue this writ as a means of reviewing the judgment of the circuit court simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge. The jurisdiction of that court is denied in this case upon two principal grounds. The *first* of these relates to matters connected with the impanelling of the grand jury, and its competency to find the indictment under which the petitioner was convicted; the *second* refers to a change made in the indictment, after it was found, by striking out some words in it, and then proceeding to try the prisoner upon the indictment as thus changed. We will proceed to examine the latter ground first.

Section 5209 of the Revised Statutes of the United States, under which this indictment is found, reads as follows: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the asso-

ciation; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section—shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years or more than ten." Section 5211 requires every banking association organized under this Act of Congress to "make to the comptroller of the currency not less than five reports during each year, verified by the oath or affirmation of the president or cashier of such association, and attested by the signatures of at least three of the directors."

The indictment in this case, which contains but a single count, and is very long, sets out one of these reports, made on the seventeenth day of March 1885, by the petitioner, as cashier, and Charles E. Jenkins, John B. Whitehead and Orlando Windsor, as directors, of the Exchange National Bank of Norfolk, a national banking association. The indictment also points out numerous false statements in this report, which, it is alleged in the early part of it, were made "with intent to injure and defraud the said association, and other companies, bodies politic and corporate, and individual persons to the jurors aforesaid unknown, and with the intent then and there to deceive any agent appointed by the comptroller of the currency, to examine the affairs of such association. Following this allegation come the specifications of the particulars in which the report is false, and the concluding part charges that the defendants, "and each of them, did then and there well know and believe the said report and statement to be false to the extent and in the mode and manner above set forth; and that they and each of them, made said false statement and report in manner and form as above set forth with intent to deceive *the comptroller of the currency* and the agent appointed to examine the affairs of said association, and to injure, deceive, and defraud the United States and said association and the depositors thereof, and other banks and national banking associations, and divers other persons and

associations to the jurors aforesaid unknown, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such cases made and provided."

The defendants having been permitted to withdraw the pleas of not guilty, which they had entered, were then allowed to demur to the indictment, and, as it is important to be accurate in stating what was done about this demurrer the transcript of the record on that subject is here inserted:

"*United States* v. *Geo. M. Bain, Jr., John B. Whitehead, Orlando Windsor, and C. E. Jenkins.*

"Indictment for making false entries, etc.

"This day came the parties, by their attorneys, pursuant to the adjournment order entered herein on the 13th day of November 1886, and thereupon the defendants, by their counsel, asked leave to withdraw the pleas heretofore entered; which being granted, they submitted their demurrer to the indictment, which, after argument, was sustained; and thereupon, on motion of the United States by counsel, the court orders that the indictment be amended by striking out the words '*the comptroller of the currency and,*' therein contained. Thereupon, on motion of John B. Whitehead and C. E. Jenkins, by their counsel, for the severance of trial, it was ordered by the court that the case be so severed that George M. Bain, Jr., cashier and director, be tried separately from John B. Whitehead, Orlando Windsor, and C. E. Jenkins, directors. Thereupon, the trial of George M. Bain, Jr., was taken up, and the said defendant, George M. Bain, Jr., entered his plea of not guilty."

This was done December 13th, 1886, thirteen months after the presentment of the indictment by the grand jury, and probably long after it had been discharged. A verdict of guilty was found against Bain, a motion for a new trial was made, and then a motion in arrest of judgment, both of which were overruled. The opinion of the circuit judge on the question which we are about to consider, delivered in overruling the motion, is found in the record.

The proposition, that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court,

or on the request of the prosecuting attorney, without being resubmitted to them for their approval, is one requiring serious consideration. Whatever judicial precedents there may have been for such action in other courts, we are at once confronted with the fifth of those articles of amendment, adopted early after the Constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that "no person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a grand jury," except in a class of cases of which this is not one. We are thus not left to the requirements of the common law in regard to the necessity of a grand jury or a trial jury, but there is the positive and restrictive language of the great fundamental instrument by which the national government is organized, that "no person shall be held to answer" for such a crime, "unless on presentment or indictment of a grand jury." But even at common law it is beyond question that in the English courts indictments could not be amended. The authorities upon this subject are numerous and unambiguous. In the great case of *Rex* v. *Wilkes*, 4 Burrow 2527, tried in 1770, which attracted an immense deal of public attention, Wilkes, after being convicted by a jury of having printed and caused to be published a seditious and scandalous libel, was brought up before the court of king's bench, on a motion to set aside the verdict, on the ground that an amendment had been made in the language of the information on which he was tried. In the course of an opinion delivered by Lord MANSFIELD, overruling the motion, he remarks on this subject (page 2569) "that there is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally; he may, with leave, amend in like manner as any plaintiff may do." Mr. Justice YATES, on the same occasion, said that indictments, being upon oath, can not be amended.

Hawkins, in his Pleas of the Crown, book 2, c. 25, § 97, says: "I take it to be settled that no criminal prosecution is within the benefit of any of the statutes of amendments; from whence it follows that no amendment can be admitted in any such prosecution, but such only as is allowed by the common law. And agreeably

hereto I find it laid down as a principle in some books, that the body of an indictment removed into the king's bench from any inferior court whatsoever, except only those of London, can in no case be amended. But it is said that the body of an indictment from London may be amended, because, by the city charter, a tenor of the record only can be removed from thence." He further says, in section 98: "It seems to have been anciently the common practice where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the court sat, to award process against the grand jury to come into court and amend it. And it seems to be the common practice at this day, while the grand jury who found a bill is before the court, to amend it, by their consent, in a matter of form, as the name or addition of the party."

This language is repeated in Starkie, Crim. Pl. 287. There are, however, several cases in which it has been decided that the caption of an indictment may be amended, and we, therefore, give here the language of Starkie (page 258), as describing what is meant by the phrase "caption of an indictment." "Where an inferior court," he says, "in obedience to a writ of *certiorari* from the king's bench, transmits the indictment to the crown office, it is accompanied with the formal history of the proceeding describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the crown office. The history of the proceedings, as copied or extracted from the schedule, is called the caption, and is entered of record, immediately before the indictment." It will be seen that, as thus explained, the caption is no part of the instrument found by the grand jury.

Wharton, in his work on Criminal Pleading and Practice, § 90, says: "No inconsiderable portion of the difficulties in the way of the criminal pleader at common law have been removed in England by 7 Geo. IV., c. 64, §§ 20, 21; 11 & 12 Vict. c. 46, and 14 & 15 Vict. 100; and in most of the states of the American Union, by statutes containing similar provisions." He also cites cases in the English courts, where amendments have been made under those statutes, but they can have no force as authority in this coun-

try, even if they permitted such amendments as the one under consideration.

No authority has been cited to us in the American courts which sustains the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. On the contrary, in the case of *Com.* v. *Child*, 13 Pick. 200, Chief Justice SHAW says: "It is a well settled rule of law that the statute respecting amendments does not extend to indictments; that a defective indictment cannot be aided by a verdict; and that an indictment had on demurrer must be held insufficient upon a motion in arrest of judgment."

In the case of *Com.* v. *Mahar*, 16 Pick. 120, the court having held, upon the arraignment of the defendant, that the indictment was defective, the Attorney-General moved to amend it, and the prisoner's counsel consented that the name of William Hayden, as the owner of the house in which the offence had been committed, should be inserted, not intending, however, to admit that Hayden was, in fact, the owner. "But the court were of opinion that this was a case in which an amendment could not be allowed, even with the consent of the prisoner."

In the case of *Com.* v. *Drew*, 3 Cush. 279, Chief Justice SHAW said: "Where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects of the first."

In the case of *State* v. *Sexton*, 3 Hawks 184, the Supreme Court of that state said: "It is a familiar rule that the indictment should state that the defendant committed the offence on a specific day and year, but it is unnecessary to prove, in any case, the precise day and year, except where the time enters into the nature of the offence. But if the indictment lay the offence to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statutes of jeofails, and can not therefore be amended. Being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found. These rules are too plain to require authority, and show that the judgment of the court was right, and must be affirmed." It will be perceived that the amendment in

that case had reference to a matter which the law did not require to be proved, as it was alleged, and which to that extent was not material. The same proposition was held in the New York Court of General Sessions, in the case of *People* v. *Campbell*, 4 Parker Crim. R. 387, where it was laid down that the averments in an indictment could not be changed, even by consent of defendant.

The learned judge who presided in the circuit court at the time the change was made in this indictment, says that the court allowed the words "comptroller of the currency and," to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change of the indictment upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon an indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to the officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said, that with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to

suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

The importance of the part played by the grand jury in England can not be better illustrated than by the language of Justice FIELD, in a charge to a grand jury, reported in 2 Sawy. 667. "The institution of the grand jury," he says, "is of very ancient order in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of commentators on the laws of that country, that it was first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district shall declare, upon careful deliberation under the

solemnity of an oath, that there is good reason for his accusation and trial."

The case of *Hurtado* v. *People*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, was a writ of error to the supreme court of that state by a party who had been convicted of the crime of murder in the state court upon an information instead of an indictment. The writ of error from this court was founded on the proposition that the provision of the fourteenth amendment to the constitution of the United States, that no state "shall deprive any person of life, liberty, or property without due process of law," required an indictment as necesary to due process of law. This court held otherwise, and that it was within the power of the states to provide punishment of all manner of crimes without indictment by a grand jury. The nature and value of a grand jury, both in this country and in the English system of law, were much discussed in that case, with reference to Coke, Magna Charta, and to other sources of information on that subject, both in the opinion of the court and in an exhaustive review of that question by Mr. Justice HARLAN in a dissenting opinion.

It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice SHAW, in the case of *Jones* v. *Robbins*, 8 Gray 329, "individual citizens from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury; and in case of high offences it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions."

It is never to be forgotten that in the construction of the language of the constitution here relied on, as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be un-

derstood to have used the language which they did in declaring that no person should be called to answer for any capital or other wise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged. The sentence of the court was that he should be imprisoned in the penitentiary at Albany. The case of *Ex parte Wilson*, 114 U. S. 418, 5 Sup. Ct. Rep. 935, and the later one of *Mackin* v. *U. S.*, 6 Id. 777, establish the proposition that this prosecution was for an infamous crime within the meaning of the constitutional provision.

It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment, as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite to an indictment in reality no longer exists. It is of no avail, under such circumstances, to say that the court has jurisdiction of the person and of the crime, for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be "held to answer," he is then entitled to be discharged so far as the offence originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if an indictment had been dismissed or a

nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Wilson*, 114 U. S. 418, 5 Sup. Ct. Rep. 935, and other cases.

These views dispense with the necessity of examining into the questions argued before us concerning the formation of the grand jury and its removal from place to place within the district. We are of opinion that the petitioner is entitled to a writ of *habeas corpus* and it is accordingly granted.

In the particular case the Supreme Court of the United States reviews the action of a Circuit Court of the United States in a criminal case. It is not very often that a criminal case finds its way to the Supreme Court of the United States, and when it does the decision of that court is usually worthy of especial attention.

I. The laws of the United States do not provide for writs of error to the Supreme Court from final judgments in any criminal case. The Circuit Courts of the United States consequently exercise a final jurisdiction in criminal cases, even though life itself may be at stake. While this is so the particular case shows that under certain circumstances the action of the Circuit Courts in criminal cases may be reviewed by the Supreme Court. This case illustrates the principle that while a writ of error will not lie to enable the Supreme Court to review a judgment of a Circuit Court in a criminal case upon the ground of error in its proceedings, yet that court may issue its writ of *habeas corpus* and discharge a prisoner held under an erroneous judgment of the Circuit Court when it appears that that court had no jurisdiction to render the judgment.

There is also another mode by which the Supreme Court may review the decision of a Circuit Court in a criminal case. The laws of Congress provide that whenever any question shall occur before the Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon request of either party, or their counsel, be stated, under direction of the judges, and certified, under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by said court be finally decided.

Under this provision that court has in a number of cases been called upon to pass on questions of criminal law. But to enable a question to be thus certified to the Supreme Court upon a certificate of a division of opinion, the difference of opinion must be a real one and not merely *pro forma*, see *Webster* v. *Cooper*, 10 How. 64.

It was at one time matter of great doubt whether the Supreme Court had a right to assume this appellate jurisdiction over the circuit courts by granting writs of *habeas corpus*, as above referred to. Mr. Justice CURTIS of that court has said that great diversity of opinion in reference to the matter existed amongst the judges of the court. But the famous case of *Ex parte Yerger*, 8 Wallace 85 (1868), settled the principle that the court possessed such appellate power. The opinion of the Chief Justice in that case also shows the diversities of opinion which had existed up to that time in regard to the matter. The existence of the power was justified under a provision of the judiciary act of 1789, authorizing the court to issue any writ necessary for the exercise of its jurisdiction.

The case of *Ex parte Royall*, 117 U. S. 241 (1885), decided that a federal court might release on a *habeas corpus* a person held in custody under a state law in violation of the constitution or laws of the United States. But it is discretionary with the court whether it will exercise the power. "This court holds that when a person is in custody, under process from a state court of original jurisdiction, for an alleged offence against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of *habeas corpus*, summarily to determine whether the petition is restrained of his liberty in violation of the Constitution of the United States." And the opinion seems to be that while this is a discretionary power, yet as a general rule it is not well to exercise it in advance of the trial in the state court.

While a federal court may release on a *habeas corpus* a prisoner held in custody under a state law, a state court cannot release a person held in custody under the laws of the United States. If a writ of *habeas corpus* is served by authority of a state court on one detaining a prisoner for an offence against the laws of the United States, it is the duty of the person on whom it is served to make known to the state court the authority by which the prisoner is held, but at the same time not to obey the process of the state court: *U. S.* v. *Booth*, 21 How. 506 (1858); and *Tarble's Case*, 3 Wall. 397 (1871).

II. The Fifth Amendment of the Constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in certain cases not necessary to be mentioned here. The meaning of the word "infamous" in this provision received an authoritative exposition in *Ex parte Wilson*, 114 U. S. 417 (1885). Prior to the decision in that case, there had been a number of decisions in the federal courts sustaining prosecutions by information for any crime a conviction of which would not at common law have disqualified the convict to be a witness: *United States* v. *Shepard*, 1 Abbott U. S. 431 (1870); *United States* v. *Maxwell*, 3 Dillon 275 (1875); *United States* v. *Block*, 4 Sawyer 211 (1877); *United States* v. *Miller*, 3 Hughes 553 (1878); *United States* v. *Baugh*, 4 Id. 501 (1880); *United States* v. *Yates*, 6 Fed. Rep. 861 (1881); *United States* v. *Field*, 21 Blatchf. 330 (1883); *In re Wilson*, 18 Fed R. 33 (1883). But in *Ex parte Wilson*, *supra*, the Supreme Court declared its opinion to be that the competency of the defendant, if convicted, to be a witness in another case, was not the true test, and it held that no person could be held to answer without presentment or indictment by a grand jury, for any crime for which an infamous punishment could be imposed by the court.

What punishments are to be considered as "infamous?" In the case above referred to, the Supreme Court, through Mr. Justice GRAY, writing the opinion, says: "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first judiciary act of the United States, whip-

ping was classed with moderate fines and short terms of imprisonment. * * * But at the present day either stocks or whipping might be thought an infamous punishment." The judgment of the court in that case was that a crime punishable by imprisonment for a term of years at hard labor was an infamous crime within the meaning of the constitutional provision already referred to.

In *Mackin* v. *United States*, 117 U. S. 348 (1885), the court re-affirmed the opinion expressed in *Ex parte Wilson*, that imprisonment at hard labor in a state prison was an infamous punishment, and in addition thereto held that imprisonment in a state prison or penitentiary, with or without hard labor, was an infamous punishment. When such a punishment can be imposed, the proceeding cannot be by information.

The same court, in *Hurtado* v. *California*, 110 U. S. 516 (1883), decided that the provision of the Fourteenth Amendment, which forbids any state to "deprive any person of life, liberty or property, without due process of law," did not require an indictment by a grand jury in a prosecution for a capital crime in a state court. The same question had been before the Supreme Court of Wisconsin in *Rowan* v. *State*, 30 Wis. 129, 144 (1872), and had been decided in the same way. And so, too, was the case of *Kalloch* v. *Superior Court*, 56 Cal. 229 (1880).

III. The ruling of the court to the effect that an indictment cannot be amended by the court, is clearly in conformity to a well established principle of the common law. The authorities are cited in the opinion in the particular case, and it will not be necessary to examine that subject farther. It is equally plain, that while at common law an indictment cannot be amended, the caption of an indictment may be amended, as that is, strictly speaking, no part of the indictment itself: *State* v. *Williams*, 2 McCord (So. C.) 301 (1822); *State* v. *Jones*, 9 N. J. Law 2 (1827); *Moody* v. *State*, 7 Blackf. (Ind.) 424 (1845); *State* v. *McCarty*, 3 Pinney (Wis.) 514 (1850); *Allen* v. *State*, 5 Wis. 337 (1856); *State* v. *Useful Manufacturers' Society*, 42 N. J. L. 504 (1880). The common law, forbidding the amendment of indictments, has been changed in England by statute, power being given to the courts to make amendments thereto. See 14 and 15 Vict. c. 100. But it would seem that the legislative power in this country could not authorize the courts to make amendments to indictments in those states where constitutional provisions secure to accused persons a trial "on a presentment or indictment of a grand jury," and not otherwise. Mr. Bishop thinks it difficult to resist the conclusion, that "if a statute should authorize a material amendment to be made in an indictment for an offence which, by the constitution of the state was punishable only by indictment, the statutory direction would be a nullity."

Bishop's Cr. Procedure (2d ed.) § 97. The Supreme Court of Mississippi, in 1876, in *Miller* v. *State*, 53 Miss. 403, sustained a statute authorizing the amendment of indictments. In the course of the opinion the court says: "It would not be competent to change the indictment so as to charge a distinct and different offence from that preferred by the grand jury; but when the amendment is merely to state truly the name of the person for an injury to whom the grand jury indicted the accused, it is not obnoxious to constitutional objection. The amendment may be made to state truly and describe accurately the *particular* (the italics are the court's) *and identical offence for which the grand jury indicted*, but not to charge one for which the grand jury had not indicted. The statute allows the court, on trial of an indictment for any offence, to cause an amendment to be made, not to introduce another and distinct offence, but to accurately describe and particularly identify, as to names,

the very offence charged, 'if it shall consider such variance' (as disclosed by evidence) 'not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on the merits;' and this is to be on such terms as to postponing the trial (lest surprise may work injury to the defence) to be had before the same or another jury, as such court shall think reasonable; and the action of the court, both in ordering an amendment and refusing a continuance on that ground, is made the subject of review by the Supreme Court. Thus limited and guarded, we do not think this power is extra-constitutional. To make certain and precise the charge in an indictment is an advantage to the defendant; and, so long as the exercise of the power is confined to truly and precisely identifying and particularizing the very offence indicted for, it violates no right, and does no harm, provided due respect is had to the limitations and conditions by which it is guarded by the statute. It is undoubtedly a very delicate power, and should be employed cautiously and with scrupulous regard to the defence on the merits, and on such terms as to preclude the possibility of the slightest harm to such defence." No authorities are examined or cited by the court in its opinion, but the opinion is followed in *Peebles* v. *State*, 55 Miss. 434 (1877), and in *Blumenberg* v. *State*, 55 Miss. 528 (1878).

The Constitution of Michigan provides that "in every criminal prosecution, the accused * * * shall be informed of the nature of the accusation." In *Brown* v. *People*, 29 Mich. 232 (1874) counsel argued that this provision made it impossible for the legislature to alter in any respect the common-law form of charging an offence. The question came up in the case of an information, informations taking the place of indictments in Michigan. The opinion of the court was written by Mr. Justice CHRISTIANCY, and it concedes that it would not be competent for the legislature to authorize any form of charging an offence, which should not inform the accused substantially of the nature and character of the particular offence intended to be proved against him, and then goes on to say: "But this provision of the constitution was not intended to prevent the legislature from dispensing with matters of form only, in the description of an offence, nor with any degree of particularity or specification in the description which did not give the defendant any substantial and reliable information of the particular offence intended to be proved, and without which he would receive substantially the same information."

The opinion is also expressed that as a general rule it would not be competent for the legislature to authorize a form of charging the offence by an information, which would give the defendant less real and substantial information of the nature of the offence than was indispensable in an indictment at common law, but at the same time the court was not prepared to say that this was a universal rule applicable to all cases. In the subsequent case of *People* v. *Olmstead*, 30 Mich. 431 (1874), the court again passed on the same constitutional provision, and held that statutes simplifying the forms of information must be confined to the omission only of such matters as are not essential to give information of the nature of the accusation.

In *McLaughlin* v. *The State*, 45 Ind. 338 (1873) the Supreme Court of Indiana passed on the provision in the constitution of that state securing to accused persons the right "to demand the nature and cause of the accusation against him," and it held that the legislature had not the power to dispense with such allegations in an indictment as an essential to reasonable particularity and certainty in the description of the offence. In *State* v. *O'Flaherty*, 7 Nev. 157 (1871) the court say: "The power of the legislature to mould and fashion the form of an in-

dictment is plenary. Its substance, however, cannot be dispensed with."

On this same subject we would call attention to the following cases. *Leasure* v. *State*, 19 Ohio St. 49 (1869); *State* v. *Manning*, 14 Texas 402 (1855); *People* v. *Mortimer*, 46 Cal. 114 (1873); *State* v. *Learned*, 47 Me. 426 (1859); *State* v. *Corson*, 59 Id. 137 (1871); *Com.* v. *Holley*, 3 Gray 458 (1855).

HENRY WADE ROGERS.

Court of Appeals of New York.

GIFFARD, RECEIVER, *v.* CORRIGAN, EXECUTOR.

The bare fact that a deed has been recorded is not sufficient evidence that it was delivered by the grantor, or accepted by the grantee or beneficiary. To establish these facts there must be other and further evidence that will support such a presumption, as that the deed would operate beneficially to the grantee, or that he had knowledge of the execution or recording of the deed.

THE opinion of the court was delivered by

ANDREWS, J.—The defendant McCloskey, in his verified answer, denied that he entered into the covenant of assumption contained in the deed executed by McEvoy, and alleged that the deed was made and executed without his knowledge, and that it was never delivered to or accepted by him. The parties proceeded to trial upon the issue so presented, and the other issues in the case. The plaintiff put in evidence from the register's office in West Chester county, the record of a deed dated May 8th 1878, recorded May 10th 1878, from McEvoy to the defendant, McCloskey, purporting to convey to "John McCloskey, Archbishop of New York," for the nominal consideration of one dollar, the mortgaged premises and a lot adjacent thereto, which deed contained a covenant on the part of the grantee, to assume and pay the principal sum of $3900 on the mortgage, with interest from January 9th 1869. The deed was executed by the grantor alone. The plaintiff rested his case against the defendant, McCloskey, solely upon the record. The case is bare of any circumstance or evidence showing, or tending to show, that the defendant, McCloskey, had any knowledge or information of the existence of the deed, or indeed of the existence of the mortgaged property prior to the commencement of the action, or that he was ever in possession, or that he ever had any conversation or negotiation with any one in respect to the property. There is no evidence who put the deed upon record, or how it came to be recorded. The bare fact of the record is all that appears connecting the defendant, McCloskey, with the transaction. The

grantor, McEvoy, died before the commencement of the action, and the defendant, McCloskey, a few months after the trial.

In determining the question whether the plaintiff made out a *prima facie* case of the delivery to and acceptance of the deed by the grantee, certain other facts need to be noticed. McEvoy was a Roman Catholic priest. He acquired title to the mortgaged property in 1870, from the trustees of the Father Matthew Temperance Benefit Association of Tuckahoe, a society incorporated under the Act of April 12th 1848, for the incorporation of benevolent, charitable, scientific and missionary societies. The conveyance of the property by the society to McEvoy was made under the order of the court, which authorized the conveyance to be made to him, "for the use of the Roman Catholic Church or the people of Tuckahoe;" and the deed referred to the order as the authority under which it was executed. It appeared by the petition upon which the order was granted that the society was unable to pay the mortgage, and that the value of the premises did not exceed the amount due thereon. The plaintiff, to maintain his claim that the deed from McEvoy to McCloskey was delivered and accepted, invokes the presumption that a party has accepted a benefit attempted to be conferred upon him, and that the record of a deed beneficial to the grantee is *prima facie* evidence of its delivery.

The property was conveyed to McEvoy for church purposes, and it cannot be doubted that in executing a deed to the defendant, McCloskey, it was his intention to vest the title in him as archbishop for the same purposes, whatever may be the legal effect of his conveyance, and not to vest in his grantee a personal beneficial interest in the property. It is well known that the title to church property in the Roman Catholic Church is frequently vested in the bishop. This tends to explain a transaction which would otherwise be peculiar, and how McEvoy may have executed a deed of the land to his ecclesiastical superior without his knowledge.

The ground of the presumption, from the bare record of a deed, that it has been delivered and accepted wholly fails in this case. The deed was not beneficial to the grantee. The property was heavily encumbered, probably to its full value. As has been stated, there is no evidence of any possession under the deed, or of any prior contract or negotiation between the parties, or of any knowledge in fact on the part of the grantee of the existence of the conveyance. In most of the cases where delivery of a deed has

been sought to be established without proof of the actual fact, there are circumstances which support the presumption of a delivery, in addition to the bare record of the deed.

We are of the opinion that, under the circumstances of this case, a delivery cannot be presumed from the record alone, and that the conclusion of the general term upon this point was correct. See *Jackson* v. *Phipps*, 12 Johns. 418; *Jackson* v. *Bodle*, 20 Id. 184; *Church* v. *Gilman*, 15 Wend. 656; *Elsey* v. *Metcalf*, 1 Denio 323. *Contra*, *Rathbun* v. *Rathbun*, 6 Barb. 98.

Construing the exceptions in connection with the issue raised by the pleadings, we think they fairly presented the question whether the evidence justified a finding that the defendant, McCloskey, made the covenant upon which he is sought to be charged. But as the case on this point may be changed on a re-trial, we think the court below should have ordered a new trial, and that its order should be modified in this respect.

There is another question argued by counsel, of great interest, which we do not deem it necessary to decide, as it may not again arise. The question relates to the effect of the release from the covenant of assumption executed by the executor of McEvoy to McCloskey, after the complaint in the action and the notice of *lis pendens* had been filed, but before the actual service of process on the defendant. Is it competent for a grantor of mortgaged premises whose conveyance was made subject to the mortgage, and contains a covenant of assumption by the grantee, without the consent of the mortgagee to release the grantee from the covenant so as to bar any remedy thereon against him by the mortgagee? And does it make any difference whether the release is executed before or after the mortgagee has notice of the covenant, or before or after suit commenced by him thereon. This question has never been finally adjudicated in this court, although expressions of judges are to be found bearing upon it: *Hartley* v. *Harrison*, 24 N. Y. 170; *Garnsey* v. *Rogers*, 47 Id. 233; *Dunning* v. *Leavitt*, 85 Id. 30; *Knickerbocker Ins. Co.* v. *Nelson*, 78 Id. 150.

Prior to *Burr* v. *Beers*, 24 N. Y. 178, as is shown by RAPALLO, J., in *Garnsey* v. *Rogers*, the right of a mortgagee to avail himself of the benefit of a covenant of payment made by a grantee of the mortgagor was regarded as an equitable right only, and was founded on the theory that "the undertaking of the grantee to pay off the encumbrance is a collateral security acquired by the mort-

gagor, which inures by an equitable subrogation to the benefit of the mortgagee." DENIO, J., in *Burr* v. *Beers*. Assuming this to be the true foundation of the rule, the question arises, when does this equitable right of subrogation attach? It is clear that it cannot be enforced by the mortgagee until default of the covenantor to pay the mortgage according to the terms of his covenant. But does not the equitable right of the creditor to the benefit of the covenant spring into existence cotemporaneously with the covenant itself, although he cannot then avail himself of it, and although he may never be in a situation which renders a resort to it necessary. This right does not rest on privity of contract between the covenantor and mortgagee. It is the application of an equitable principle long recognised, to work out the real justice of the transaction. If the right of the creditor to the collateral security springs into existence concurrently with the origin of the relation of principal and surety, between the mortgagor and his grantee, ought the immediate parties to the covenant, by a mere release, to be permitted to change the situation of the mortgagee, and deprive him of the security of the covenant? It is true that there is no direct contract with the mortgagee, nor is there any consideration moving between the mortgagee and covenantor. But does the absence of the consideration between these parties justify the mortgagor in cancelling a security which he has taken for his own protection, and which, at the same time, operates also as a protection to his creditors, and especially when this is done for the mere purpose of defeating the remedy of the latter. The case of *Burr* v. *Beers*, established the doctrine in this state that an action at law would lie in favor of the mortgagee against the grantee of the mortgagor on the covenant of assumption. Would the defence of a release be available when the action is in this form, assuming that it would not be available in the equitable action? In truth is the direct action on the covenant not an action founded upon the equity of the transaction, rather than upon the notion of a contract between the parties? We leave the question raised by the release in this case undecided. We prefer not to decide it until it is squarely and necessarily presented.

The order and judgment of the General Term should be modified by directing a new trial, and as so modified, affirmed, with costs to abide the event.

The authorities do not assert the rule as above laid down, that there must be something more than the act of recording a deed, to constitute a delivery; but

hold that recording, or filing for record, is *prima facie* evidence of delivery—because that act shows that the grantor intended a delivery, and, in the absence of anything to the contrary, should have effect. Delivery is *presumed*, from the act of recording or filing for record: *Guilbert* v. *Ins. Co.*, 23 Wend. 43; *Bulkley* v. *Buffington*, 5 McL. 457; *Bulkley* v. *Carleton*, 6 Id. 125; *Mitchell* v. *Ryan*, 3 O. St. 377. Not an actual delivery, nor conclusive evidence of a delivery, *Eames* v. *Phipps*, 12 Johns. 418; *Hawkes* v. *Pike*, 105 Mass. 560; but a *presumptive* or *prima facie* delivery, to stand until rebutted, or some other fact, or intention is shown: *Lawrence* v. *Farley*, 24 Hun 293; *Younge* v. *Guilbeau*, 3 Wall. 636; *Rigler* v. *Cloud*, 14 Pa. St. 361; *Kille* v. *Ege*, 79 Id. 15; *Chess* v. *Chess*, 1 P. & W. 32; *Boardman* v. *Dean*, 34 Pa. St. 252; *Van Valen* v. *Schemerhorn*, 22 How. Pr. 416; *Wilsey* v. *Dennis*, 44 Barb. 354. What facts are sufficient to rebut this presumption—this *prima facie* delivery—and show that there was no delivery, and no intention to deliver, depends upon the facts of each case: *Knolls* v. *Barnhart*, 71 N. Y. 474; *Thompson* v. *Jones*, 1 Head 576; *Deitz* v. *Farish*, 79 N. Y. 520. For instance, if the grantee gets possession of the deed by fraud or after the death of the grantor, and procures the recordation, there is no delivery: *Critchfield* v. *Critchfield*, 24 Pa. St. 100; *Van Amringe* v. *Morton*, 4 Whart. 382; *Ritter* v. *Worth*, 58 N. Y. 627; *Martin* v. *Ramsey*, 5 Humph. 349. Or where the registration was done upon certain conditions, in which case the *onus* is on the grantor: *Thompson* v. *Jones*, 1 Head 575; *Watson* v. *Ryan*, 3 Tenn. Ch. 40. And where a parent executed a deed to his son, had the same recorded and left at the register's office until it was called for; the son knowing nothing of the transaction, and the deed was returned to the grantor on his demand; it was held that there had been no delivery: *Maynard* v. *Maynard*, 10 Mass. 456, but it is held otherwise if the grantee had obtained the deed from the registry: *Harrison* v. *Phillips Academy*, 12 Mass. 455, or assented to it, or accepted it: *Hedge* v. *Drew*, 12 Pick. 141. But where there is the mere sending of the deed to the register, without the knowledge of the grantee, and hence no act of acceptance express or implied on his part, no title passes to the grantee as against a creditor of the grantor who attached the land before the grantee had accepted the deed. *Samson* v. *Thornton*, 3 Met. 275. And where the grantor, in the absence of the grantee, left the deed with the register to be recorded, and after recordation it was given back to the grantor; this constituted *no* delivery, although the grantor may have had notice of the conveyance: *Hawkes* v. *Pike*, 105 Mass. 560. But it should be otherwise if the grantee had accepted or asserted title under it, there being, of course, no condition attached by the grantor upon placing the deed for record: *Taylor* v. *McClure*, 28 Ind. 39; *Mallett* v. *Page*, 8 Id. 364; *Stout* v. *Duning*, 72 Id. 343; *Hoffman* v. *Mackall*, 5 O. St. 124; *Baldwin* v. *Snowden*, 11 Id. 203; for the very good reason that there cannot be a delivery without an acceptance: *Fonda* v. *Sage*, 46 Barb. 109; *Foster* v. *Beardsley Scythe Co.*, 47 Id. 505; *Black* v. *Hoyt*, 33 O. St. 203. Yet it has been held that a delivery to the recorder, to be held for the grantee, is a good delivery: *Tompkins* v. *Wheeler*, 16 Pet. 106—not, however, if the grantee repudiates the deed upon receiving notice, or, in other words, fails to accept.

The rule is, a deed does not operate until delivered. There is no delivery without an acceptance. Any word or act, express or implied, which shows that the grantor intended to deliver, and the grantee intended to accept, is sufficient to constitute a good delivery. It is a question of intent, provable as any other fact; intent on behalf of the grantor to deliver, and intent on the part of the

grantee to accept, both of which can be done expressly or by implication: *Burkholder* v. *Casad*, 47 Ind. 418; *Somes* v. *Pumphrey*, 24 Id. 231. For instance, where the name of the grantee has been inserted by the grantor without the knowledge of the grantee, and the deed then placed on record by the grantor, if the grantee disavow the conveyance, as soon as the fact comes to his knowledge, there is no delivery: *Day* v. *Mooney*, 4 Hun 134; because there was no acceptance, which is necessary to constitute delivery: *Kearney* v. *Jeffries*, 48 Miss. 343; *Merrill* v. *Swift*, 18 Conn. 261; *Corbett* v. *Norcross*, 35 N. H. 99. Therefore, to constitute delivery, there must be the act of the grantor and the act of the grantee. These acts can be expressed or implied. Any act or word showing the intent is sufficient. Hence, it was held that as the acceptance can be expressed or implied, it is implied when the deed is beneficial to the grantee, or when he has notice and does not disavow it: *Kearney* v. *Jeffries*, 48 Miss. 343; *Tibbals* v. *Jacobs*, 31 Conn. 431; *Treadway* v. *Ins. Co.*, 29 Id. 71; *Hallock* v. *Bush*, 2 Root 595; *Graham* v. *Lambert*, 5 Humph. 260. The trouble is in determining what constitutes an acceptance, and as an acceptance is contained in a delivery, the question would be what constitutes a delivery: *Hopkins* v. *Leek*, 12 Wend. 105; *Utterbach* v. *Binns*, 1 McL. 242; *Fletcher* v. *Mansure*, 5 Ind. 267; *Gray* v. *State*, 9 Id. 25. First, then, what constitutes an acceptance? There will be an acceptance if the grantee fail to disavow the conveyance, as soon as the fact comes to his knowledge: *Day* v. *Mooney*, 4 Hun 134; but not when the deed is delivered to the grantee's agent to be held whilst his principal considers the question of its acceptance, though the deed be placed upon record: *Ford* v. *James*, 4 Keyes 300; s. c. 2 Abb. Dec. 159; *Carnes* v. *Platt*, 6 Rob. 270. An acceptance may be presumed from the beneficent nature of the transaction, and will not be presumed where the grantee derives no benefit, or is subject to a duty, or the performance of a trust: *Printard* v. *Bodle*, 20 Johns. 184; *Ten Eyck* v. *Richards*, 6 Cow. 617. If presumed from the benefit conferred by the deed, to rebut that presumption there must be a disavowal, and, in the latter case, an express acceptance: *Fonda* v. *Sage*, 46 Barb. 109; *Carnes* v. *Platt*, 6 Rob. 270; *Stephens* v. *Buffalo & New York City Rd. Co.*, 20 Barb. 332. The acceptance can be expressed or implied: *Foster* v. *Beardsley Scythe Co.*, 47 Id. 505. The fact of acceptance may be found from the acts of the parties, preceding, attending and subsequent to the signing, sealing, and acknowledgment of the instrument: *Dukes* v. *Spangler*, 35 O. St. 119. But in all cases there must be an acceptance to vest the grantee with title under it, because a conveyance cannot be forced upon a man: *Lloyd* v. *Giddings*, 7 Ohio, 2 pt. 53; *Kearny* v. *Jeffries*, 48 Miss. 343. A person indebted to a bank executed a mortgage for the debt, but without the knowledge of the bank, and after depositing the paper for record, sent word to the bank that such mortgage had been executed and left for record, the cashier replying that he was glad of it. In a contest for priority between the bank and a subsequent mortgagee, it was held that the facts showed a good acceptance: *Farm. & Mech. Bank* v. *Drury*, 38 Vt. 426.

What constitutes a Delivery:—There is no formality necessary: *Farrar* v. *Bridges*, 5 Humph. 411. It can be by acts or by words, expressed or implied. If the intention to make a delivery is evinced or manifested in any clear and unequivocal manner, it is sufficient, and it is a question of fact open to parol evidence and may be inferred from circumstances: Add. Cont. 7. Hence, if that intent is clear from the fact of delivery for record, it is a good delivery: *Thompson* v. *Jones*, 1 Head 576; *Nichol* v. *Da-*

vidson Co., 3 Tenn. Ch. 546; *Watson* v. *Ryan*, Id. 40. But the deed must have been properly executed, the grantor divested of the power to recall it, and grantee must have accepted it: *Brevard* v. *Neely*, 2 Sneed 165; *Kirkman* v. *Bank*, 2 Cold. 402; although the deed remain in the actual custody of the grantor: *Sedgerwood* v. *Gault*, 2 Lea 646; *Farrar* v. *Bridges*, *supra*; *McEwen* v. *Troost*, 1 Sneed 186.

It is a good delivery if the deed be delivered to a third person for the beneficiary: *Graham* v. *Lambert*, 5 Humph. 595; to a third person to be delivered to the grantee at the death of the grantor, and such deed is so delivered; the title passes upon such last delivery, and the deed takes effect as of the date of the first delivery: *Crooks* v. *Crooks*, 34 O. St. 610; to the officer taking the acknowledgment, to be delivered to the grantee whenever he called for it, where it is accepted by the grantee, although the officer retains possession: *Black* v. *Hoyt*, 33 O. St. 203. And so if the deed pass from the control of the grantor by his own act, with the declaration that it is delivered for the use of the grantee (and the grantee accepts): *Eckman* v. *Eckman*, 55 Pa. St. 269; *Arthur* v. *Bascom*, 28 Leg. Int. 284: *Steel* v. *Tuttle*, 15 S. & R. 210; *Dayton* v. *Newman*, 19 Pa. St. 194. Or if it be left with a magistrate, without instructions: *Blight* v. *Schenck*, 10 Id. 285; if the grantee accept; and he accepts if he execute a purchase-mony mortgage: *McDowell* v. *Cooper*, 14 S. & R. 269. So, too, a delivery to a third person to hand over the deed, or record the same after grantor's death: *Stephens* v. *Huss*, 53 Pa. St. 20; *Stephens* v. *Rinehart*, 72 Id. 434; *when accepted*: *Mitchell* v. *Ryan*, 3 O. St. 377. And it has been held that the deed of a wife's lands must be delivered to the grantee in her lifetime, in order to pass the estate: *Shoenberger* v. *Zook*, 34 Pa. St. 24; *Shoenberger* v. *Hackman*, 37 Id. 87. But the reason for this is not apparent. The delivery is good if made by a releasor to the agent of the releasee: *Rd.* v. *Iliff*, 13 O. St. 235, and when grantee agreed beforehand to accept: *Hoffman* v. *Mackall*, 5 O. St. 124, and when a husband delivers the joint deed of himself and wife without the knowledge of the wife, or notice of her dissent: *Baldwin* v. *Snowden*, 11 O. St. 203; and where delivered to a vendee, although upon an understanding that it should not be effective until the purchase-money be paid: *Resor* v. *O. & M. Rd. Co.* 17 O. St. 139, and where the *cestui que trust* takes the deed from the table where it has been laid for her, and then kept it in her possession until her death, this is a good delivery: *Jaques* v. *Methodist Episcopal Church*, 17 Johns. 548; s. c. 1 Johns. Ch. 450. And it has been held that a delivery is also good, even against the grantee's written promise to return the deed on demand or pay the consideration if no demand be made: *Howe* v. *Dewing*, 2 Gray 476.

On the other hand, there is no delivery if the deed be placed in the grantor's trunk, to be there kept until after his death, the grantor saying that when that happened each man could get his own: *Taylor* v. *Taylor*, 2 Humph. 597; nor if the deed be found amongst the grantor's effects after his death: *Martin* v. *Ramsey*, 5 Humph. 349; nor if possession has been obtained by fraud: *Ritter* v. *Worth*, 58 N. Y. 627; nor when the grantee disavows the conveyance as soon as the fact comes to his knowledge: *Day* v. *Mooney*, 4 Hun 134; nor if the deed be placed in hands of a scrivener on condition: *Epley* v. *Witherow*, 17 Leg. Int. 356; nor if it is given to one of several grantees without more: *Hannah* v. *Swarner*, 8 Watts 9; nor if the deed be surreptitiously or fraudulently taken from the grantor's house, and this even as to a *bona fide* purchaser: *Van Amringe* v. *Morton*, 4 Whart. 382; nor if obtained from the grantor's effects after his death without more. *Critchfield* v. *Critchfield*, 24 Penn. St. 100; though it would be

otherwise if any facts exist showing or tending to show that the grantor intended that the deed should be delivered to the grantee: *Stinger* v. *Com.*, 26 Penn. St. 422; nor the mere fact of recording: *Barr* v. *Schroeder*, 32 Cal. 610; nor delivery to a third person to await the performance of certain conditions: *Ogden* v. *Ogden*, 4 O. St. 182, and cases cited; *Lloyd* v. *Yiddings*, 7 Ohio 375. And although the intention to deliver existed at the time of execution, yet, if the deed be retained by the grantor until his death, no title passes to the grantee: *McCrea* v. *Dunlap*, 1 Johns. Cas. 114; *Stillwell* v. *Hubbard*, 20 Wend. 44; *Osterhout* v. *Shoemaker*, 3 Hill 513; *Fisher* v. *Hall*, 41 N. Y. 416; *Bryant* v. *Bryant*, 42 Id. 11; *Roosevelt* v. *Carow*, 6 Barb. 190; nor where a person in expectation of death delivers a deed to a stranger to be delivered to the grantee after the grantor's death, and he recovers, receives back the deed and lives nearly five years thereafter, and after the grantor's death the grantee obtains possession of the deed, does any title pass to the grantee, because there is no delivery of the deed: *Jacobs* v. *Alexander*, 19 Barb. 243; nor does delivery arise from the sending of the deed to a stranger, or its deposit in a public office, unless sent or deposited for the use of the grantee: *Elsey* v. *Metcalf*, 1 Den. 323; and accepted by him: *Ford* v. *James*, 4 Keyes 300; nor where the grantor before acknowledgment gives it to the grantee, but after acknowledgment keeps it: *Mills* v. *Gore*, 20 Pick. 28; or takes it for the purpose of getting from his wife a release of dower and not returning it to grantee: *Parker* v. *Parker*, 1 Gray 409; nor where the deed is delivered to a third person "until called for" and is then taken back by the grantor is there a delivery: *Maynard* v. *Maynard*, 10 Mass. 456.

JOHN F. KELLY.

Washington, D. C.

Supreme Court of Kansas.

STATE *v.* WALKER ET AL.

The mutual present assent to immediate marriage, by persons capable of assuming that relation, is sufficient to constitute marriage at common law; and such a marriage will be sustained in Kansas where its validity is directly drawn in question.

The legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage, and a provision prescribing penalties against those who solemnize or contract marriage contrary to statutory command is within legislative authority.

Punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements, without rendering the marriage itself void.

Under section 12 of the Marriage Act, all persons who enter the marriage relation, and live together as man and wife, without complying with the conditions and regulations of the act, are guilty of a misdemeanor, and subject to the punishment imposed by that section.

APPEAL from Jefferson county.

E. C. Walker and Lillian Harman were prosecuted in the Dis-

trict Court of Jefferson county for a violation of section 12 of the Marriage Act, which reads as follows: "That any persons, living together as man and wife, within this state, without being married, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum of not less than five hundred dollars, nor more than one thousand dollars, or be imprisoned in the county jail not less than thirty days, nor more than three months." Comp. Laws 1879, p. 539. At the trial, which was had with a jury, Moses Harman, the father of Lillian Harman, testified that on September 19th 1886, his daughter, Lillian, and E. C. Walker entered into what he called an "autonomistic marriage," at his home, in the presence of himself and two other persons. On that occasion, a statement concerning the compact or union about to be entered into was read by the witness, then followed a statement made by E. C. Walker, which was responded to by Lillian Harman, and the ceremony was terminated by another short statement from the witness. These statements were published in the "Lucifer," a newspaper edited by the witness, and the account there given was read in evidence, and is as follows:

"*Autonomistic Marriage Practicalized.*—While distinctly denying the right of any citizen or citizens, whether minority or majority, to inquire into our private affairs, or to dictate to us as to the manner in which we shall discharge our private duties and obligations to each other, we wish it understood that we are not afraid nor ashamed to let the world know the nature of the civil compact entered into between Lillian Harman and Edwin C. Walker, at the home of the senior editor of "Lucifer," on Sunday, the nineteenth of September, 1886, of the common calendar. As our answer, then, to the many questions in regard thereto, we have reproduced as near as possible the aforesaid proceedings.

"(1) M. Harman, father of Lillian Harman, one of the parties to this agreement or compact, read the following, as a general statement of principles in regard to marriage: 'Marriage, by which term we mean the various attractions, sentiments, arrangements, and interests, physical, social, material, involved in the sex-relations of men and women, is, or should be, distinctively a personal matter, a strictly private affair. There are, or should be, but two parties to this arrangement or compact,—a man and a woman; or perhaps we should say, a woman and a man, since the interests, the fate of woman is involved, for weal or woe in marriage, to a far greater

extent than is the fate or interests of man. Some one has said, 'Marriage is for man only an episode, while for woman it is the epic of her life.' Hence it would seem right and proper that, in all arrangements pertaining to marriage, woman should have the first voice or control. Marriage looks to maternity, motherhood, as its most important result or outcome, and, as dame nature has placed the burden of maternity upon woman, it would seem that marriage should be emphatically and distinctively woman's work, woman's institution. It need not be said that this is not the common, the popular, and especially, the legal view of marriage. The very etymology itself of the word tells a very different story. Marriage is derived from the French word '*mari*' meaning the 'husband.' And never did the etymology of a word more truly indicate its popular and legal meaning than does the etymology of this one. Marriage, as enforced in so called Christian lands, as well as in most heathen countries, is pre-eminently man's affair, man's institution. Its origin—mythologic origin—declares that woman was made for man, not man for woman, not each for the other. History shows that man has ruled over woman as mythology declares he should do; and the marriage laws themselves show that they were made by man for man's benefit, not for woman's. Marriage means, or results in, the family as an institution, and the laws and customs pertaining thereto make man the head and autocrat of the family. When a woman marries, she merges her individu ality as a legal person into that of her husband, even to the surrender of her name, just as chattel slaves were required to take the name of their master. Against all such invasive laws and unjust discriminations, we, as autonomists, hereby most solemnly protest. We most distinctly and positively reject, repudiate and abjure all such laws and regulations; and if we ever have acknowledged allegiance to these statute laws regulating marriage, we hereby renounce and disclaim all such allegiance. To particularize and recapitulate: Marriage being a strictly personal matter, we deny the right of society, in the form of church and state, to regulate it or interfere with the individual man and woman in this relation. All such interference, from our standpoint, is regarded as an impertinence, and worse than an impertinence. To acknowledge the right of the state to dictate to us in these matters is to acknowledge ourselves the children or minor wards of the state, not capable of transacting our own business. We therefore most solemnly and earnestly

repudiate, abjure, and reject the authority, the rites and ceremonies of church and state in marriage, as we reject the mummeries of the church in the ceremony called baptism, and at the bedside of the dying. The priest, or other state official, can no more prepare the contracting parties for the duties of marriage than he can prepare the dying for life in another world. In either case, the preparation must be the work of the parties immediately concerned. We regard all such attempts at regulation on the part of church and state as not only an impertinence, not only wrong in principle, but disastrous to the last degree in practice. Here, as everywhere else in the realm of personal rights and reciprocal duties, we regard intelligent choice—untrampled voluntaryism—coupled with responsibility to natural law for our acts, as the true and only basis of morality. As a matter of principle we are opposed to the making of promises on occasions like this. The promise to 'love and honor' may become quite impossible of fulfilment, and that from no fault of the party making such promise. The promise to 'love, honor and obey, so long as both shall live,' commonly exacted of woman, we regard as a highly immoral promise. It makes woman the inferior—the vassal—of her husband, and when, from any cause, love ceases to exist between the parties, this promise binds her to do an immoral act, viz.: It binds her to prostitute her sexhood at the command of an unloving and unlovable husband. For these and other reasons that will readily suggest themselves, we, as autonomists, prefer not to make any promises of the kind usually made as part of marriage ceremonies.

"(2) E. C. Walker, as one of the contracting parties, made the following statement: 'This is a time for clear, frank statement. While regarding all public marital ceremonies as essentially and ineradicably indelicate,—a pandering to the morbid, vicious, and meddlesome element in human nature,—I consider this form the least objectionable. I abdicate in advance all the so-called 'marital rights' with which this public acknowledgment of our relationship may invest me. Lillian is and will continue to be as free to repulse any and all advances of mine as she has been heretofore. In joining with me in this love and labor union, she has not alienated a single natural right. She remains sovereign of herself, as I of myself, and we severally and together repudiate all powers legally conferred upon husbands and wives. In legal marriage, woman surrenders herself to the law and to her husband, and be-

comes a vassal. Here it is different; Lillian is now made free. In brief, and in addition: I cheerfully and distinctly recognise this woman's right to the control of her own person; her right and duty to retain her own name; her right to the possession of all property inherited, earned, or otherwise justly gained by her; her equality with me in this copartnership; my responsibility to her as regards the care of offspring, if any, and her paramount right to the custody thereof, should any unfortunate fate dissolve this union. And now, friends, a few words especially to you. This wholly private compact is here announced, not because I recognise that you, or society at large, or the state, have any right to inquire into or determine our relations to each other, but simply as a guarantee to Lillian of my good faith towards her. And to this I pledge my honor.'

"(3) Lillian Harman then responded as follows: 'I do not care to say much; actions speak more clearly than words, often. I enter into this union with Mr. Walker of my own free will and choice, and I agree with the views of my father and of Mr. Walker as just expressed. I make no promises that it may become impossible or immoral for me to fulfil; but retain the right to act, always, as my conscience and best judgment shall dictate. I retain, also, my full maiden name, as I am sure it is my duty to do. With this understanding, I give to him my hand in token of my trust in him, and of the fidelity to truth and honor of my intentions toward him.'

"Then M. Harman said: 'As the father and natural guardian of Lillian Harman, I hereby give my consent to this union. I do not 'give away the bride,' as I wish her to be always the owner of her person, and to be free always to act according to her truest and purest impulses, and as her highest judgment may dictate.'"

It was expressly admitted that no license for the marriage of the defendants had been obtained, and that no marriage ceremony was performed by any judge, justice of the peace, or licensed preacher of the gospel, and that neither of the defendants belonged to the Society of Friends or Quakers. The proceedings mentioned were followed by the matrimonial cohabitation of the defendants. Upon this testimony, the jury returned a verdict of guilty. Motions in arrest of judgment, and for a new trial, were filed and overruled, and the judgment of the court was that the defendant E. C. Walker be confined in the county jail for a period of seventy-five days, and

the defendant Lillian Harman for a period of forty-five days, and that the defendants pay the costs of the action, and stand committed to the jail of the county until payment is made. The defendants appealed.

Overmeyer & Safford, and *G. C. Clemens*, for the appellants.

S. B. Bradford, Atty. Gen., and *W. F. Gilluly*, for the state.

JOHNSTON, J.—The questions to be determined upon this appeal arise upon an instruction given to the jury upon the trial, in which it was said that, "if the defendants, at the time alleged in the information, and in this state, agreed to live together as husband and wife, without having a license to be married, and without having a marriage solemnized by a judge, justice of the peace, or licensed minister of the gospel, and in pursuance of such agreement lived together in this county, they would be guilty of the offence charged in the information." The instruction is founded upon the Marriage Act, and the manifest theory of the court is that the law of Kansas has provided rules regulating the marriage contract, and has prescribed a penalty or punishment for those who live together as man and wife without observing its requirements. In behalf of the appellants, it is urged that what was said and done by them was sufficient to constitute marriage at common law. It is claimed that the formalities prescribed by statutes are not essential to the validity of the marriage, and that, as the contract of marriage between the defendants was not void, they are not punishable for failing to observe the statutory requirements in entering into the marriage contract, and that, therefore, the instruction given was erroneous.

The correctness of the instruction depends upon the proper interpretation of the Marriage Act. The first section of the act provides that a marriage contract shall be considered in law as a civil contract, to which the consent of the parties is essential, and that the ceremony may be regarded either as a civil ceremony or as a religious sacrament; but it provides that "the marriage relation shall only be entered into, maintained or abrogated, as provided by law." The second section provides that consanguinity shall be an impediment to marriage, and all marriages between the forbidden degrees of consanguinity are declared to be incestuous and void. The third section declares that all persons who contract, license, or solemnize an incestuous marriage, shall be guilty of a misdemeanor

and subject to fine and imprisonment. The fourth section declares a penalty against any person who shall join others in marriage before a license has been issued by the probate judge. The fifth section provides that the probate judge shall issue a license to all persons legally entitled to the same, upon application, and prescribes the form of the license. In the sixth section the probate judge is required to make a record of the licenses issued by him, as well as of the return endorsed upon the license by the person performing the marriage ceremony, and states the fee to which he is entitled. The seventh section visits a penalty upon the probate judge who refuses or neglects to issue a license to a person legally entitled thereto, when application is made, or who neglects to make a record of the license issued, or the return endorsed thereon. The eighth section empowers the probate judge to administer oaths and examine witnesses with reference to the right of persons who apply to him for license to assume the marriage relation, and also prescribes a penalty for issuing a license to persons not legally entitled thereto. The ninth section provides that marriages contracted outside of this state, and which are valid where contracted, shall be deemed valid in this state. The tenth section provides that every judge, justice of the peace, or licensed preacher of the gospel may perform the marriage ceremony in this state, and shall certify on the back of the license the fact of the marriage, and the date thereof, and cause the license to be returned to the probate judge within thirty days. To that section is added a proviso that marriages solemnized among the Society of Friends or Quakers, in accordance with their forms and usage, shall be good and valid, and shall not be affected by the provisions of the marriage act. The eleventh section provides that the books of record of marriage licenses, and the entries therein certified to by the probate judge, under his official seal, shall be evidence in all courts. The twelfth section, and the one under which this prosecution is brought, provides that "any persons living together as man and wife within this state, without being married, shall be deemed guilty of a misdemeanor," etc.; and the thirteenth section provides that all records heretofore kept relating to marriages, shall be delivered to the probate judge in the county within thirty days after the taking effect of the act.

It is palpable that the leading idea and purpose of this act is to compel publicity, and to require a record to be made of the marriages contracted in Kansas. By the terms of the act, marriage is

declared to be a civil contract, the essential feature of which is the consent of the parties. No particular ceremony or form of solemnization is prescribed or required. The settled doctrine of the law to be applied in a case where the validity of a marriage is drawn in question is that, in the absence of all civil or statutory regulations, the mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient, without any formal solemnization, Such a contract constitutes a marriage at common law, and its validity will be sustained, unless some statute expressly declares it to be void: *Meister* v. *Moore*, 99 U. S. 76; 1 Bish. Mar. & Div. §§ 279, 280, 283, *et seq.*, and numerous cases there cited. It may also be conceded to be well established that marriage, being a natural right, and existing before the statutes, is favored by the law; and that all statutory regulations, if the language will permit, are to be construed as merely directory. "The doctrine has become established in authority that a marriage, good at the common law, is good, notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity:" 1 Bish. Mar. & Div. § 283. It is also true, that according to the terms of the Marriage Act, the only marriage contracts declared to be void are those entered into between persons closely allied in blood, which are everywhere prohibited. No such relationship existed between the defendants; nor is it shown that there was any impediment to their marriage. The penalties inflicted by other provisions of the statute upon officers and those who fail to observe the required formalities, do not necessarily render a consensual marriage void; but this does not meet the charge against the defendants, nor render erroneous the instruction of the court. If the question involved in the case was whether the marriage was void or voidable, or if the legitimacy of children were in question, the argument of the defendants would be more applicable; and yet we are not prepared to say that the contract between the defendants is a common-law marriage. The question actually presented is whether the legislature intended to inflict punishment on those who entered the marriage relation without observing the statutory regulations. The legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage; and a provision making it an offence, and punishing those who solemnize or contract marriage contrary to statutory command, is within the legislative authority. Punishment may be inflicted on those who enter the marriage relation in

disregard of the prescribed statutory conditions, without rendering the marriage itself void.

In *Tetèr* v. *Teter*, 101 Ind. 129, the Supreme Court of Indiana, while holding that ceremonial rites were not indispensable, and that the intention to assume the relation of husband and wife, attended by pure and just motives, and accompanied by an open acknowledgment of that relation, is sufficient to constitute marriage, stated that "persons may be punished for not obtaining licenses to marry, or for not taking steps to secure a proper record of the marriage; but there may nevertheless be a valid marriage." Mr. Bishop says that "this rule seems not to be peculiar to the common law. It exists also in Sicily and in Scotland, where marriages contrary to the established forms are frequent, and no question remains as to their validity. The law imposes severe penalties upon the parties, the celebrator, and the witnesses:" 1 Bish. Mar. and Div. § 287. This, in our opinion, is the legislative purpose and expression in enacting section 12 of the marriage act. The provision imposing a penalty upon those who live together as man and wife, without being married, is a part of the marriage act, wherein is provided how marriage contracts may be entered into and solemnized. In the first section of the act, it is provided that the marriage relation shall only be entered into in the manner provided by law. It proceeds to state what the manner is, and then prescribes penalties that are to be visited on all who disregard the rules laid down. It is to be observed that the law relating to marriage was changed in 1867, at which time the words were added to the first section that "the marriage relation shall only be entered into, maintained, or abrogated as provided by law." At the same time, the twelfth section was added, providing the punishment which the defendants are now seeking to escape. These changes were not idly made, but were manifestly intended to compel compliance with the formalities and conditions prescribed. It is evident from the penalties imposed, that the legislature deemed the enforcement of the statutory regulations as important and beneficial, not only to the parties contracting marriage, but to society at large as well. The probate judge is to be punished if he issues a license to those not entitled to one; magistrates and ministers of the gospel are forbidden under heavy penalties to marry persons before a license has been obtained; and the probate judge is declared guilty of an offence if he fails to properly record the license and the return

thereon. By these and other penalties, the legislature undertook to prevent the officers and ministers from authorizing or solemnizing marriages, where the conditions and formalities of the statute have not been observed. The same idea is further carried out in the twelfth section, by visiting a punishment upon the parties themselves for failing to conform to the rules prescribed. The legislature directs how parties may be married, and then declares a punishment against them for living together as man and wife without being married as the law provided. It is true that the penalty is directed against those who live together as man and wife "without being married." These words, we think, refer to those who assume the marriage relation, without being married in the manner and upon the conditions that the legislature has declared marriage should be contracted. When persons who are permitted to marry "live together as man and wife," it may be taken as an expression of consent; and consent, under these circumstances, is sufficient, as we have seen, to constitute a marriage at common law. It was certainly not intended that persons guilty of bigamy or adultery, nor persons who intermarry or cohabit with each other that are within the forbidden degrees of consanguinity, nor yet that a man or woman, one or both of whom are married, who shall abide or cohabit with each other, should be prosecuted and punished under this provision, as those defences are defined, and the punishment declared, in the Crimes act: Gen. St. c. 31, art. 7. Under that act, severe punishment is measured out to those who marry or live together as man and wife where there is a legal impediment to their marriage. For these offences there is a maximum punishment prescribed of from five to seven years imprisonment, while a conviction under the provisions of the marriage act which we are considering, subjects the parties to a mere fine, or to imprisonment in the county jail not more than three months.

The exception made by the statute in regard to marriages solemnized among the society of Friends or Quakers, lends support to the view which we have taken. Marriage with them is based on consent, publicly declared in one of their meetings, and has all the elements necessary to make it good at common law. According to the defendants' theory, they would not be liable to the penalty written in section 12, because marriage celebrated in accordance with their usage is valid at common law. But to relieve them from complying with the formalities of the statute, and to exempt them

from the penalty provided, the legislature deemed it necessary to except their informal marriages from the operation of the act. The argument made that, to require an observance of the statutory regulations, trenches upon the liberty of conscience guaranteed by the constitution, is not sound. Although marriage is generally solemnized with some religious ceremony, it is not under the control of ecclesiastical or religious authority. No religious rite or ceremony is prescribed. The intervention of a preacher or priest is not essential, and no religious qualification is required. So careful was the legislature to guard against any such invasion, that no particular form of ceremony is prescribed; and in the first section of the act it is declared that the ceremony may be regarded either as a civil ceremony or as a religious sacrament. The regulations prescribed are neither burdensome nor unreasonable. These parties may go before a probate judge and obtain a license for a nominal fee, and there, in his presence, and without further rite or ceremony, perfect the marriage by declaring that they take each other for man and wife. The so-called "mummeries of the church" against which the defendants so strenuously object and protest may be wholly omitted, and they may be married in as plain and matter of fact manner, and with as short and simple a ceremony, as can be desired, by a justice of the peace or other magistrate. It cannot be doubted that the purpose of the statutory regulation is wise and salutary. They give publicity to a contract which is of deep concern to the public, discourage deception and seduction, prevent illicit intercourse under the guise of matrimony, relieve from doubt the *status* of parties who live together as man and wife, and the record required to be made furnishes evidence of the *status* and legitimacy of their offspring. In the accomplishment of this purpose it was just as necessary to provide a penalty against parties who contract marriage in disregard of the rules prescribed, as against officers and ministers who only perform a minor part in the proceedings; and we have no doubt that this was the legislative intention in the enactment of section 12 of the Marriage Act. We see no reason to declare the act invalid, and finding no error in the record, we must affirm the judgment of the District Court.

HORTON, C. J. (*concurring*).—Upon the record, as presented to us, the question, in my opinion, for consideration is, not whether

Edwin Walker and Lillian Harman are married, but whether, in marrying, or rather in living together as man and wife, they have observed the statutory requirements. The language of the statute is: "The marriage relation shall only be entered into, maintained or abrogated as provided by law," and "any persons living together as man and wife, within this state, without being married, shall be deemed guilty of a misdemeanor:" Section 12, c. 61, Comp. Laws 1879. My construction of these provisions is that a ceremonial marriage must be celebrated in conformity therewith; and that any persons living together as man and wife, without being married according to these directions, are liable to the penalty thereof. I do not say, nor do I intend to intimate, that a "consensual marriage" is not valid; but the legislature has the right to require parties assuming the marriage relation to have the marriage entered into publicly, and a record made of the same. This I think the purpose of the statutory regulations. Whatever commands the state may give respecting a formal marriage, the courts usually hold a marriage at common law to be good, notwithstanding the statute, unless it contains express words of nullity; yet persons who marry without conforming to the statutory regulations, may be punished, although the marriage itself be valid.

The consequences of marriage, as to conjugal rights and the rights of heirs, are so momentous that the interest of society may properly require a witness to the marriage, and a record of its acknowledgment. This much is required in the acknowledgment and registration of an ordinary conveyance of real estate. If there be no registration, no officiator, and no eye-witness of the marriage, the woman is placed at the mercy of the man, who may deny the "consensual relation," and repudiate her; and, on the other hand, a man may be blackmailed by an adventuress, who may declare there was a "consensual marriage" when there was none; therefore, the statute requiring the registration and acknowledgment of marriage is for the benefit of the parties as well as their heirs. No man, who desires in good faith to make a woman his wife, will object to obtaining a marriage license, and going before some person authorized to perform the marriage ceremony, and acknowledging the marriage. The fees for a marriage license, and its return, are only two dollars. The acknowledgment of the marriage relation may be made for a trifling sum, unless the parties voluntarily donate a liberal fee.

As a rule, I do not think that any woman who has reached the years of discretion, and has a full appreciation of the marriage relation, will demur, when it is proposed to clothe her matrimonial association with the forms of law. If the man objects to having his marriage public, he tacitly admits that he intends to cheat her whom he has privately promised to make his wife. It is only just that the acknowledgment and registration of the marriage relation should not be left to the whim and caprice of the parties, because no transaction in the life of a man or woman is more important, or fraught with more significant consequences; and society is supremely interested in having a marriage entered into publicly, and to have a record thereof.

But counsel claim that Edwin Walker and Lillian Harman should not be imprisoned on account of their non-observance of the statutory provisions regarding marriage, upon the ground that the statute "is an interference with their conscience," and therefore unconstitutional. Section 7, Bill of Rights. The assertion that the acknowledgment and registration of a marriage conflicts with any right of conscience, is wholly without foundation. The provisions of the act relating to marriage, no more infringe the state constitution than does the law regulating the acknowledgment and registration of real estate conveyances, chattel mortgages, &c.; in fact, but little more ceremony is required for the one than for the other. The statute does not demand that the marriage ceremony shall be regarded as a religious sacrament; no recognition of the pope, or the church of Rome, or any minister, priest, church, religion or superstition is required; no intervention of a person in "holy orders" is requisite. The marriage does not have to be celebrated in any church, chapel or other religious or public edifice. A probate judge or a justice of the peace may solemnize the marriage, and this may be done at the home of the parties, in the office of the official, or any other place the parties may select. The ceremony, if the parties so desire, may consist in the simple presentation to the official of the marriage license, and a request that he take cognizance of the mutual engagement of the parties to assume the marriage relation. No special form or solemnization is prescribed or demanded.

Instead of permitting the man, as in olden times, to go to the house where his betrothed resides, and lead her away to his own house, and call her his wife, and live with her as his wife, the

statute requires the man and wife, if they are to live together in the marriage relation, to obtain a license at the office of the probate judge, and have their mututal engagement acknowledged before some authorized person. The license, after the marriage, is to be returned to the office of the probate judge, and the registration thereof becomes public. If the parties in this case preferred to enter into the marriage relation without any religious or other elaborate ceremony, they could have done so within the terms of the statute, by obtaining a license, and going quietly before some justice of the peace, and had their marriage relation there witnessed and acknowledged. They might have had as much ceremony, or as little, as they chose. I cannot understand how the provisions of the statute can be truthfully denounced a "monstrosity," or in what way the "sacred liberty," or "the personal rights" of the parties are infringed. If Lillian Harman desires to retain her own name, I can perceive no objection for her doing so. There is nothing in the statute justifying a man in being guilty of cruelty, or other inhuman or brutal conduct towards his wife, and the wife does not merge her individuality, as a legal person, in that of her husband.

The constitution and statutes of Kansas are very liberal in recognising the rights and privileges of women. Marriage involves neither the assumption of indebtedness nor the acquisition of property. A married woman may contract and be contracted with concerning her separate real and personal property; sell, convey and encumber the same; sue and be sued with reference thereto, in the same manner, and to the same extent, and with like effect, and as freely, as any other person may, in regard to his or her real or personal property. She may purchase personal property from her husband, perform labor and services on her sole and separate account, and make the earnings therefrom her sole and separate property. She has the same control of her person and property as her husband. She has the same rights as to the nurture, education and control of her children, and, also, the same rights in the possession of the homestead. *Knaggs* v. *Mastin*, 9 Kan. 532; *Tallman* v. *Jones*, 13 Id. 438; *Going* v. *Orns*, 8 Id. 85; *Larimer* v. *Kelley*, 10 Id. 298; *Butler* v. *Butler*, 21 Id. 526. She may participate in all city elections, attend caucuses, nominate candidates, and vote for such persons and principles as her judgment dictates. In fact, in Kansas, a woman, in nearly all matters, is accorded civil and political equality with man. She is not his

servant or his slave. Here the sexes may harmonize in opinion, and co-operate in effort; here woman is no longer subordinate to man, but the two are co-ordinate together; here the burden of a common prejudice and a common ignorance against woman has been wholly removed; here the tyranny which degrades and crushes the wives and mothers in other countries no longer exists; here the coveted rewards of life, forever forbidden them in some of the states, are within their reach; here a fair field for their genius and industry is open, and womanhood, with the approbation of all, may assert its divinely chartered rights, and fulfil its noblest duties.

If Edwin Walker and Lillian Harman are suffering imprisonment, it is because they have wilfully and obstinately refused to conform to the simple and inexpensive regulations of the statute directing marriage. In their non-observance of these regulations, they have exhibited neither good sense nor sound reason. For purposely and publicly defying the law, enacted for their benefit, and the benefit of their offspring, if they shall have any, they are now punished; and if they persist in the future in living together as man and wife, without complying with the statute, they deserve, and undoubtedly will receive, further punishment, if criminal proceedings be instituted against them. They can at any time easily procure a license to marry, go before an officer, and acknowledge their marriage; and then they will become, within all of the terms of the statute, husband and wife. Then over their union there can be no contention; then the wife may be to the husband, in law and in deed,—

> "A guardian angel o'er his life presiding,
> Doubling his pleasures, and his cares dividing."

VALENTINE, J.—I concur in the judgment of affirmance. I do not believe that E. C. Walker and Lillian Harman were married in any sense. In my opinion, their lengthy and prolix ceremony at the time of forming their questionable union did not meet the necessary requirements of the law, either statutory or common, to establish a valid marriage. It is true, where a license is obtained, and the parties are competent to marry each other, a bare acknowledgment before a judge, justice of the peace or licensed preacher of the gospel, that they in the present assume the marriage relation, is all that is necessary to constitute a valid marriage; but none of these things were done in the present case. I shall also assume

that, aside from the statutes, but in accordance with the common law, a valid consensual marriage may be created in Kansas. In other words, the mere living together as husband and wife of a man and woman competent to marry each other, with the honest intention of being husband and wife so long as they both shall live, will constitute them husband and wife, and create a valid marriage. But that is not this case. In the present case, the parties repudiated nearly everything essential to a valid marriage, and openly avowed this repudiation at the commencement of their union. They avowed among other things, that they would not be governed by the laws of the state or of society upon this subject, but would be governed only by their own notions of right and propriety. They announced, in effect that they "repudiated all powers legally conferred upon husbands and wives," and that they "are opposed to the making of promises," and that both were to remain free, as before their union; and they did not make the necessary and essential promises to constitute them husband and wife. Walker, as a part of the ceremony, said, "I abdicate in advance all the so-called marital rights;" and Lillian Harman agreed with him in all things. After this ceremony, which took place on Sunday, September 19th 1886, and up to their arrest in this case, which took place on Monday, the next day after the ceremony, Walker and Lillian Harman lived together as husband and wife, but without any intention of being such in legal contemplation. That is, they lived together, but had no intention of creating that relation or *status* known and defined by law and by the customs and usages of all civilized society as marriage. This living together under such circumstances did not in law constitute a valid marriage. If they had lived together for years, and until they had had children, and until one of them had died, it might then, in the interest of the innocent children, and notwithstanding the perverseness and waywardness of their parents, be assumed and held that the parents had changed their first unlawful intentions, and had converted what would have continued to be an unlawful union into a legal and valid marriage. Much more might be said with reference to this question, but I think this is sufficient. In my opinion, the union between E. C. Walker and Lillian Harman was no marriage, and they deserve all the punishment which has been inflicted on them.